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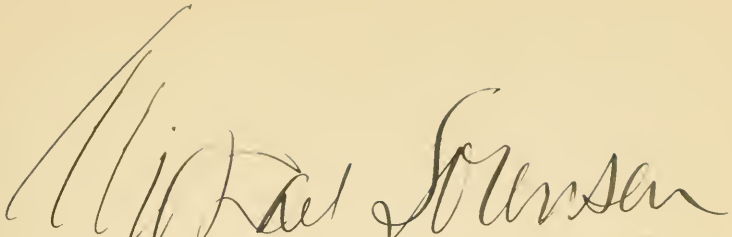

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CASES

ON

EQUITY PLEADING

AND

PRACTICE

BY

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PREFACE.

The cases contained in this volume have been selected with a view of assisting both the student and the instructor, with illustrations of the practical application of the general principles and rules of equity pleading and practice. Only so much of the statement of fact and of the opinion of the court have been retained in each case as is sufficient to make the decision upon the question of pleading before the Court intelligible and clear. As far as possible all padding has been excluded.

In the selection of these cases and in the preparation of this volume, we are greatly indebted to the valuable assistance of John W. Dwyer, LL. M., Instructor of Law in the University of Michigan.

Littleton has said: "And know, my son, that it is one of the most honorable, laudable, and profitable things in our law to have the science of well pleading; and, therefore, I counsel thee especially to employ thy courage and care to learn this."

We hope that this collection of cases will be of some practical assistance to the teacher in giving instruction in this very difficult branch of the law and that it will stimulate the courage of the student to master the "science of well pleading."

B. M. THOMPSON.

University of Michigan, March 1, 1903.

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CASES

ON

EQUITY PLEADING AND PRACTICE

CHAPTER I.

PERSONS CAPABLE OF SUING AND BEING SUED IN EQUITY.

Suits by Aliens.

Bell v. *Chapman, 10 Johns. (N. Y.) 183. (1813.)*

Action on a covenant contained in a lease. Suit commenced by a British subject during the war of 1812. The defendant put in the plea that the plaintiff was an alien enemy. To this plea, the plaintiff demurred, and the defendant joined in the demurrer.

Per Curiam:

The plea *puis darrein continuance* avers that the plaintiff was, at the commencement of the suit, and still is, commorant in Ireland; and that since the last adjournment he has become an alien enemy, being an alien, born within the allegiance of the King of Great Britain, with whom we are at war, and the plea concludes in bar of the action. There is no doubt that the plea is a valid one in the case of the alien's residence in the enemy's country, and the plea may be pleaded either in abatement or in bar, for the precedents are both ways. (Bast. Ent. tit. Ejectment, 7. tit. Trespass per Alien, 1. Cornw. Tab. tit. Abatement, 7. tit. Bar in Divers Actions, 87. *Wells* v. *Williams,* 1 Lutw. 34, 35. *West* v. *Sutton,* 1 Salk. 2.) This plea conforms precisely to the opinion of the K. B. in *Le Bret* v. *Papillon* (4 East, 502), in concluding in bar of the *further* maintenance of the suit. As the disability of the plaintiff is but temporary in its nature (for a state of perpetual war is not to be presumed), the good sense and logic of pleading would seem to

be in favor of the plea concluding in abatement, when the cause of action is not void or extinguished. But whether the plea be in the one form or the other is, perhaps, not material, for the judgment thereon would not be a bar to a new action on the return of peace. A judgment is no bar to a new suit, unless it involves the merits of the controversy, or be founded on matter which affords a permanent avoidance, or discharge. But the present plea only bars the plaintiff, in his character of *alien enemy commorant abroad,* from prosecuting the suit. It does not so much as touch the merits of the action. In a late case in chancery (*Ex parte Boussmaker,* 13 Ves. 71), Lord Erskine declared that the alien's right of action, in such a case, was only suspended by the war, and that if the contract was originally good, the remedy would revive on the return of peace. This was even the ancient doctrine, according to Lord Coke, who said (Co. Litt. 129. b.) that "true it is an alien enemy shall maintain neither real nor personal action, *donec terræ fuerint communes,* that is, until both nations be in peace." It is also admitted by the best modern authorities, on the law of nations, that the plea of alien enemy is only a temporary bar to the recovery of private debts, and that the right of action returns with the return of peace. (Bynk. Quæst. Jur. Pub. b. 1. c. 7. Vattel, b. 3. c. 5. s. 77.)

There is, then, no well founded objection to the plea, and the defendant is entitled to judgment.

Judgment for the defendant.*

*In the case of *Clark* v. *Morey,* 10 Johns. (N. Y.) 69 (1813), which was an action on a promissory note, the plaintiff, at the time being an alien enemy residing in this country, the court stated the law as follows: "And it has now become the sense and practice of nations, and may be regarded as the *public law of Europe,* that the subjects of the enemy, so long as they are permitted to remain in the country, are to be protected in their persons and property, and to be allowed to sue as well as to be sued. It is even held, that if they are ordered away, in consequence of the war, they are still entitled to leave a power of attorney, and to collect their debts by suit."

SUITS BY AND AGAINST SOVEREIGNS.

King v. *Kuepper, 22 Mo. 550. (1856.)*

ERROR to St. Louis Circuit Court.

This was a suit brought by Frederick William IV, king of Prussia, against Felix Coste, administrator of Frederick William Kuepper, deceased. The petition is as follows: "The plaintiff states that he is absolute monarch of the kingdom of Prussia, and as king thereof is the sole government of that country; that he is unrestrained by any constitution or law, and that his will, expressed in due form, is the only law of that country, and is the only legal power there known to exist as law.

"The plaintiff further states that by the law of Prussia any money or its equivalent sent or transmitted through the royal post department of that country, or received to be so transmitted or sent by any duly authorized officer of said department, if lost, stolen or embezzled, is to be refunded to the proper owners thereof by the plaintiff, through his officers and agents, and that such was the law on and long before the 10th April, 1849. The plaintiff further states that the said Kuepper was on and for a long time before the 10th April, 1849, the plaintiff's servant and post officer at Wermelskirchen, in the kingdom of Prussia, and that while said Kuepper was such post officer, he received, in his official capacity, large sums of money, or its equivalent, portions of which money, or its equivalent, were transmitted through such department, and received by said Kuepper as aforesaid, to be delivered by him to the true owners thereof at Wermelskirchen, and portions of which were deposited with him as aforesaid by persons at Wermelskirchen, to be transmitted by him through said post department to persons at various places; and the plaintiff, if required, is willing and ready to give a statement of each item, by and to whom sent, when, &c. The whole amount of the moneys or its equivalent, so received by said Kuepper, was seven thousand four hundred German dollars, or thereabout, which, in the currency of the United States, are equal to sixty-nine cents each.

"The plaintiff further says that on or about the 10th April, 1849, said Kuepper did abscond with all said sums of money,

and did embezzle and convert the same to his own use, and secretly fled and escaped from the said kingdom and came to St. Louis, Missouri, where he died in the summer of 1849, and letters of administration on his estate were duly granted to the defendant (Coste) by the St. Louis probate court, on the thirty-first day of July, 1849. The plaintiff further states that he has, according to the law and custom of his said kingdom, duly refunded and paid to the various and proper owners thereof the various sums of money or its equivalent, stolen and embezzled from them respectively by said Kuepper as aforesaid, and that he therefore has, according to said law and custom, and by justice and right ought to and has a just and legal demand against the defendant, for the sums of money by him and his officers so refunded and paid.

"The plaintiff says, therefore, that the defendant justly owes him said sum of money, and he estimates his damages for said money and interest at the sum of seven thousand dollars, for which last sum he asks judgment against the defendant."

The defendant demurred to this petition, and assigned the following reasons: That the petition does not state facts sufficient to constitute a cause of action; that it does not state any legal privity between the plaintiff and defendant; that it does not state any legal right in the plaintiff to recover the said sums of money alleged to have been embezzled from certain persons living in the kingdom of Prussia; that it does not state any legal right in the plaintiff to recover for the money embezzled by the said Kuepper, which, at the time of the embezzlement, belonged to other persons than the plaintiff; that the plaintiff was not under any legal obligation to pay to the persons from whom Kuepper embezzled property as alleged, and the payment of such losses was merely voluntary, and that the plaintiff has no legal capacity to sue in this court; wherefore the defendant prayed judgment and for costs.

The court below sustained the demurrer, and gave judgment for the defendant, to which plaintiff duly excepted. Plaintiff brings the case here by writ of error.

SCOTT, Judge, delivered the opinion of the court.

This case comes up on a demurrer, and raises the question whether a foreign sovereign can sue in our courts. It seems to be now well settled in England that a foreign sovereign can sue in her courts both at law and in equity. In the case of *Hullet*

& Co. v. *The King of Spain,* Lord Redesdale said: "I have no doubt but a foreign sovereign may sue in this country, otherwise there would be a right without a remedy. He sues here on behalf of his subjects, and if foreign sovereigns were not allowed to do that, the refusal might be a cause of war. (1 Dow & Clark, 175; *The King of Spain* v. *Machado,* 3 Con. Eng. Chan. 645; 1 Clark & Finnelly, 333; *The Columbian Government* v. *Rothschilds,* 2 Con. Eng. Chan. 48.)

Kings have been allowed to sue in the United States. In the case of the *King of Spain* v. *Oliver* (1 Pet. C. C. R. 276), the suit was entertained without question as to the right of a foreign sovereign to sue. So the case of the *Republic of Mexico* v. *Arrangois* and others (11 How. Prac. Rep. 1) was entertained by the courts of New York. In our courts, a writ in the name of the state of Indiana was brought and passed through all of them, without any question as to the right to do so. (*Tagart* v. *State of Indiana,* 15 Mo. 209.)

If the subjects of foreign governments will contract obligations or affect themselves with liabilities to their kings or princes, and afterwards migrate to the United States, there is nothing in the nature of our institutions which shields them from their just responsibilities. While our government grants the rights and privileges of citizenship to all foreigners who are naturalized under our laws, there is neither policy nor justice in screening them from the civil liabilities which they have contracted with the government to which they were once subject. Our tribunals afford no assistance in the enforcement of the penal codes of foreign nations, nor would they aid despotic rulers, in the exercise of an arbitrary power, in making special and retrospective laws affecting foreigners residing here, who were once their subjects. But when laws have been made abroad, and debts have been contracted under those laws, there is no reason for refusing our assistance in their collection. Though foreign laws may be enacted by a power and in a way inconsistent with the spirit of our institutions, that is no reason why they should not be enforced against those who have incurred responsibilities in respect of them. Foreign nations have the same right to determine the form of government most conducive to their happiness that we have, and to deny the validity of their laws, because they have not been made in a manner conformable to our notions of government, would be to destroy

all comity among nations and introduce endless wars and quarrels. The averments in the petition show that by the laws of Prussia, the defendant's intestate was indebted to his sovereign, and he should be made to answer for it.

It was maintained that this suit should have been brought in the courts of the United States, as the constitution of the United States expressly provides "that the judicial power shall extend to all cases between a state or the citizens thereof, and foreign states, citizens or subjects."

The government of the United States being entrusted with the power of peace and war, it was necessary to invest it with authority to establish tribunals to which foreign states or subjects might resort for injuries sustained by the conduct of those residing within the limits of the United States. For the judgments of tribunals thus established, the United States would be responsible to foreign states. But if they, passing by the courts created by the general government for the redress of grievances they may have sustained at the hands of citizens of the United States, will litigate their rights in courts for whose conduct the United States are not responsible, if they should be dissatisfied with the measure of justice meted to them by the courts, they have no cause of complaint against the federal government. The ready answer to any remonstrances made on that score, would be that there should have been a resort to the tribunals established by the United States. The foreign prince has the right to resort to the courts of the general government; this is a privilege the constitution and laws secure to him; but he may renounce it like any other privilege, and litigate his rights in the state courts.

Whilst commentators on the constitution maintain that it is competent for congress to vest all of the judicial powers of the United States exclusively in tribunals of its own creation, it is nevertheless admitted that this has not been done, and that the state courts, in cases in which they had cognizance before the adoption of the federal constitution, may, concurrently with the courts of the United States, still entertain jurisdiction.

The state courts, undoubtedly, before the existence of the federal government, had cognizance of causes in which foreign states were plaintiffs. That jurisdiction remains, unless it has been taken away by the constitution and laws of the United States. The grant of judicial powers by the constitution, in some cases, is exclusive;

in others, it is concurrent at the will of congress; that is, congress may make it exclusive or concurrent, as it seems best. In cases in which the state courts had cognizance before the adoption of the constitution of the United States, that jurisdiction remains unless it is taken away. Congress has conformed its action to this principle, and has suffered a portion of the judicial powers of the United States to be exercised by the state courts. (1 Kent, 398; Story's Comm. § 1784.) The jurisdiction, in cases of the character of that under consideration, has not been exclusively vested in the federal courts; hence the state courts may still exercise jurisdiction in all such cases.

With the concurrence of the other judges, the judgment will be reversed, and the cause remanded.

SUITS BY AND AGAINST INFANTS.

Jarvis v. *Crozier, 98 Fed. Rep. 753. (1899.)*

On Motion to Remand to State Court.

JACKSON, District Judge:

This cause was removed to this court, by the defendant Samuel A. Crozier, from the circuit court of McDowell county, and the record filed on the 14th day of November, 1895. Upon the 5th day of January, 1898, a motion was made by the plaintiffs to remand the cause to the circuit court of McDowell county, which motion (being argued by counsel) the court, upon consideration thereof, overruled. Between the time of filing the record in this court and the motion to remand, there seems to have been little preparation made for the hearing of the cause, except the filing of the joint answer of Samuel A. Crozier in his own right and of the trustees of the Crozier Land Association, and the answer of the Norfolk & Western Railroad Company. Since the motion to remand was overruled, quite a number of depositions have been taken by the defendants in support of their answers. The plaintiffs, failing to take any evidence in the case, have at the present term of the court asked leave to renew their motion to remand, which leave was granted, and the court again heard the argument, and this cause now comes on to be heard upon that motion.

It appears from the bill filed in this cause by B. F. Jarvis in his

own right, and as the next friend of Mary Carry Bowen and Bowen Watts, who are infants, against the defendants, that the plaintiffs derived title to a certain tract of land some years ago, known as "Peery Bottoms," containing about 29 acres; that the lands were conveyed by one Andrew Sarver, one half to William T. Moore, and the other half to Peery and Bowen, and that William T. Moore subsequently conveyed his one-half to J. A. Belcher, who afterwards conveyed that one-half interest acquired from Moore to Samuel A. Crozier, and that Crozier conveyed a portion of his one-half to the Norfolk & Western Railroad Company; and that the remaining portion of his half was conveyed to trustees for the Crozier Land Association. The bill discloses the fact that both Peery and Bowen are dead, and that their one-half interest passed to their heirs, and that all of the heirs except the infant plaintiffs, Mary Carry Bowen and Bowen Watts, have conveyed their respective interests in said parcel of land to the plaintiff Jarvis. The only object and purpose of this bill is a partition of the land described in the bill between the various owners in severalty, except a prayer for general relief. Upon the face of the bill, there is no controversy between the plaintiffs and defendants as to the extent of their respective interests. The bill upon its face shows that the plaintiff Jarvis is only entitled to one-fourth, and that the two infant heirs of Bowen are entitled to one-fourth, making one-half, and that Crozier and those under whom he claims are entitled to the other half. The question of title is not in controversy, as both sides claim under Sarver as a common source of title. It is to be observed that there is no allegation in this bill that Jarvis, who sues as the next friend for the infant plaintiffs, was ever authorized to do so by a court, or by next of kin, or by anybody interested in them. It does not appear that he is in any wise related to them, but that he assumed the right, without any authority whatsoever, of making them plaintiffs in this cause of action. Ordinarily they would properly be defendants to the cause for the purposes of partition, as sought in this bill. There is no dispute between Jarvis and the infant plaintiffs as to their title or the extent of it. He admits upon the face of the bill that they are the owners of one undivided one-fourth of the 29 acres. It seems to the court that the draftsman of this bill had a special object in associating the infants as plaintiffs with Jarvis, and that the object was to prevent, if possible, the removal of this cause by Crozier, the Crozier Land

Association, and the Norfolk & Western Railroad Company into the courts of the United States, all of which defendants are non-residents of the district of West Virginia. If this be the case, and the court can properly do so, would it not be a case in which the court would transpose the parties, and place them on the respective sides of the case, so as to retain the case for hearing in this court if it can be done? The only matter in dispute or controversy, if it can be called a controversy, between the infant plaintiffs and the plaintiff Jarvis, would be the laying off of their respective interests in the said land. It is claimed that by reason of the fact of the infant plaintiffs being citizens of Virginia, and the Norfolk & Western Railroad Company being also a citizen of Virginia, this case is not wholly a case between citizens of different states. This partition can be had just as well by the infant plaintiffs being transposed and made infant defendants in the case, and their rights as fully and amply protected, as if they were plaintiffs to the action. The whole theory of the case, as presented by the bill, shows that they would more properly be defendants than plaintiffs; and in the absence of an allegation in the bill that Jarvis was authorized to bring this suit, and associate these infants as infant plaintiffs, or the exhibition of any authority sustaining an allegation of that character, it would seem to be right, and properly so, to transpose these parties, and make them defendants in this cause, in order that the rights of all parties could be heard and adjudicated in this tribunal, where the defendants Samuel A. Crozier, the trustees of the Crozier Land Association, and the Norfolk & Western Railroad Company could be heard, as they desired.

In the Removal Cases, 100 U. S. 457, 25 L. Ed. 593, the court held:

"For the purposes of a removal the matter in dispute may be ascertained and, according to the facts, the parties to the suit arranged on opposite sides of that dispute. If in such an arrangement it appears that those on the one side, being all citizens of different states from those on the other, desire a removal, the suit may be removed."

In the case of *Barney* v. *Latham,* 103 U. S. 205, 26 L. Ed. 514, the court held (following the cases just cited) that you may disregard as immaterial the mere form of the pleadings, and place the parties on the opposite side of the real matter in dispute, according to the facts.

In the case of *Hyde* v. *Ruble,* 104 U. S. 407, 26 L. Ed. 823, following the decisions in the Removal Cases, the court held that where all the parties to the controversy on one side are citizens of different states from those on the other side, and there is in the suit a separable controversy, wholly between the parties who are citizens of different states, which can be fully determined as between them, it may be removed.

It may be contended in this case that the infant plaintiffs have made no application for a removal. They could only make it by a party who was duly authorized to represent them as their next friend, either by an order of court, or by a party who was either an executor or a personal representative who had control of their estate, or who was next of kin, and so nearly related to them that the court would recognize the right to act for them. So far as the present case is concerned, it does not appear that Jarvis was ever authorized to act for them, or that he was ever authorized to institute this suit for them; but he has made use of their names, and subjected them to litigation, and the costs and expenses thereof, without the slightest authority therefor. Is not such action upon the part of Jarvis calculated to awaken the attention of the court in the case, and is it not a mark of inexcusable inattention to make infants plaintiffs in an action by a party as a next friend who is neither next of kin nor has exhibited any authority whatever to justify his action in arranging them as plaintiffs to an action in which he had a personal interest? It is a well-settled principle that any one must have no personal interest, however remote or indirect, who either institutes or defends an action for infants as their next friend. *In re Burgess,* 25 Ch. Div. 243; *In re Corsellis,* 50 Law T. (N. S.) 703. "When an infant claims a right or suffers an injury on account of which it is necessary to resort to a court of chancery to protect his rights, his nearest relation, not concerned in point of interest in the matter in question, is supposed to be the person who will take him under his protection and institute a suit to assert his rights, or defend an action against him; and it is for this reason that a person who institutes a suit on behalf of an infant is termed 'his next friend.'" 1 Daniell, Ch. Prac. 69. Legal proceedings in favor of an infant should in every respect be strictly guarded, for the reason that an infant on coming of age can repudiate a suit brought in his name, and the court would be compelled to strike out his name as plaintiff and add it as a defendant.

Chief Justice Marshall, in the case of *Bank* v. *Ritchie,* 8 Pet. 128, 8 L. Ed. 890, discusses at some length the rights of parties to appear for infants; and, in a case in which there was an attempt to secure a judgment against infants who were represented by a guardian *ad litem,* he remarks that "the guardian *ad litem* was appointed on motion of counsel for the plaintiffs, without bringing the minors into court, or issuing a commission for the purpose of making the appointment. This is contrary to the most approved usage, and is certainly a mark of inexcusable inattention,"—and refers to Coop. Eq. Pl. 109, for his position. It is the duty of a court of equity to look after the interests of infant defendants, and to protect them, in the absence of any one to represent them; and it would seem proper in this case that a court of equity should make the infants defendants, and appoint a guardian *ad litem* to protect their interests as infant defendants, instead of allowing them to remain as plaintiffs to that action, and possibly have their estate more or less absorbed by the costs and expenses of litigation. An order will be entered transposing the position of Mary Carry Bowen and Bowen Watts from plaintiffs to defendants, and making them defendants in this action; also, directing that a guardian *ad litem* be appointed for the infant defendants, to protect their interests. For the reasons assigned, the motion to remand is overruled.

Waring v. *Crane, 2 Paige (N. Y.) 79. (1830.)*

The bill in this cause was filed in July, 1824, in the name of the complainants, who were infants, by A. Brunson, as the next friend of W. Waring, and by W. Baker, as the next friend of the other three complainants; charging the defendants, who were executors, with mismanagement of the estate of the father of the complainants; and also alleging that one of the defendants was irresponsible. An injunction was granted restraining the executors from selling or disposing of the estate. In October, 1825, upon the application of the defendants, and with the consent of the counsel for the complainants, a receiver of the estate was appointed. On the fourth of March, 1827, W. Waring became of age; but without adverting to that fact the cause was brought to a hearing without giving any notice to him or calling upon him to appoint a solicitor. On the 16th of April, 1827, a decree for an account

was made by the consent of the counsel for the defendants and of the guardians of the complainants. The cause was afterwards brought to a hearing on the master's report, but it being ascertained that one of the complainants was of age and had no notice of the hearing, the chancellor ordered the cause to stand over, that such complainant might have notice to appear and defend his rights. An order was subsequently made referring it to a master to enquire and report whether there were any just grounds for the commencement and prosecution of this suit; and whether the same had been prosecuted by the advice of counsel in good faith, and with the sole object of subserving the interest of the infant complainants; and to enquire and report whether the complainant W. Waring, since he became of age, had adopted the proceedings in the suit and assumed the agency and management thereof. The master reported that although there were apparently, yet in fact there were no just grounds for the commencement of the suit; that the suit was commenced for the infants by the advice of counsel, and with the sole object of subserving their interests; that after W. Waring became of age, he took possession of the papers in the suit, and procured a master to proceed on the order of reference; and that since May or June, 1827, he had had the direction and management of the suit. After this report was made, the cause was brought to a final hearing, upon the pleadings, proofs, reports and the objections of the complainants' counsel to the last report.

THE CHANCELLOR:

If a bill is filed on behalf of an infant by his next friend, and the bill is dismissed or a decree is made in the cause before the infant is of age, he cannot be personally charged with the costs. They are to be charged against the next friend, unless there is a fund under the control of the court belonging to the infant, in which case the court may direct the costs to be paid out of that fund. (*Taner* v. *Ivie*, 2 Ves. sen. 466.) But the costs will not be charged on the infant's estate, unless the court is satisfied the suit was brought in good faith, and with a *bona fide* intent to benefit the infant. (*Pearce* v. *Pearce*, 9 Ves. 547. *Whitaker* v. *Marlar*, 1 Cox's Cas. 285.) In *Turner* v. *Turner* (2 Peere Wms. 297), the next friend died before a decree in the cause. After the infant became of age, he refused to proceed in the suit; and the bill was dismissed against him with costs. But on a re-hearing in that

case, Lord King reversed his former decree as to the costs, and decreed that the infant was not liable therefor. (1 Strange, 708. 2 Eq. Ca. Abr. 238, S. C.) If the suit was improperly brought, and the infant elects to abandon it when he becomes of age, he may apply to the court for a reference to ascertain the fact, and the bill will then be dismissed, with costs to be paid by the next friend. But although the complainant elects to abandon the suit when he is of age, he cannot, as a matter of course, compel the next friend to pay the costs. If the suit was properly brought for the infant's benefit, he must pay the costs of the next friend, and also those of the adverse party, when he applies to dismiss the bill. (Anon. 4 Madd. R. 461.) If he elects to proceed in the cause after he is of age, the next friend is discharged from his liability, and the infant will be liable in the same manner as if the suit had been commenced by an adult. (1 Harrison, 474. Mitford, 26.) The only exception to this rule must be, the case that sometimes occurs, where a decree has been made during his infancy, by which the infant's rights are bound. There the suit cannot be abandoned, although it was not brought in good faith, and was against the interest of the infant. In such a case, if the infant applied in time, the court might compel the next friend to remunerate him for the costs and expenses to which his estate had been improperly subjected, although he was compelled to proceed under the decree. In this case, W. Waring became of age before the decree was made against the executors for an account. He afterwards elected to proceed under the decree, and took the management of the reference into his own hands. He has therefore affirmed the act of his next friend in bringing the suit, and it is too late for him now to insist that it was improperly brought. His proportion of the defendants' costs must be charged on him personally, or be paid out of his share of the estate.

The situation of the next friend of the two complainants who have not arrived of age is different. If the suit was now in a situation to have the bill dismissed without prejudice to the rights of the infants when they come of age, I should be disposed to charge the costs upon their next friend, on the ground that the suit was improperly instituted by him, and without taking ordinary care to inform himself as to the facts. But some embarrassment now arises from the decree of April, 1827, under which the accounts of the defendants have been taken. By the will of the

testator the defendants were trustees, both of the real and personal estate, until the youngest child became of age; and it was their duty to take care of it until that time, and then sell or divide it among the complainants. Instead of consenting to a decree for an account, and asking for the appointment of a receiver, they should have asked for a dismissal of the bill; to enable them to go on and execute the trust, and account to the heirs when they became of age. The report of the master upon that reference having been confirmed, that accounting, so far as it goes, must be considered final between the parties. But the defendants cannot take the legacies, which were evidently intended as a remuneration in part to them for the execution of their trust under the will, and abandon the trust. As they have been guilty of no misconduct or breach of trust they are entitled to the costs of defending this suit and of taking the account, to be paid out of the fund. The injunction must be dissolved and the receiver discharged; and he must account with and pay over to the defendants the balance, if any in his hands, and deliver to them all property which has come to his possession. In case of disagreement, his accounts must be passed before a master residing in the county of Jefferson. The decree must direct the defendants to proceed and execute the trust according to the directions of the will, and to distribute the property among the complainants when they become of age, respectively, retaining out of the share of each one-third of the costs of this suit. It must reserve to the complainants the right to apply to the court for further directions as they shall be advised, if they cannot settle the estate amicably with the executors; but the account, as far as it has been taken is to be conclusive upon both parties. The defendants are also to be at liberty to apply to the court from time to time as they shall be advised, for directions in relation to the execution of their trust; giving the usual notice of such application to the complainant who is of age or to his solicitor, and to the guardian of the infants. The right is also to be reserved to each of the complainants who are infants, at any time within six months after they come of age, and notwithstanding any acts done by them under the decree in this cause, to apply to the court for such order and direction in relation to the costs, as between them and their next friend, as may be just.

Knickerbacker v. *De Freest, 2 Paige (N. Y.) 304. (1830.)*

THIS was an application on the part of the complainant to appoint a guardian for an infant defendant. The infant had neglected to appear, for twenty days after the time for appearing as prescribed in the 22d rule had expired; and a petition was thereupon presented to the court agreeably to the last section of the 144th rule, requesting that a particular person named in such petition should be appointed guardian.

THE CHANCELLOR:

The court never selects a guardian *ad litem* for an infant defendant on the nomination of the adverse party. It is frequently necessary for the guardian seriously to contest the complainant's claim. It is his duty in every case to ascertain from the infant and his friends, or from other proper sources of information, what are the legal and equitable rights of his ward. And if a special answer is necessary, or advisable, for the purpose of bringing the rights of the infant properly before the court, it is his duty to put in such an answer. If the infant is a mere nominal party, or has no defence against the complainant, and no equitable rights as against his co-defendants which render a special answer necessary, the general answer will be sufficient. If the infant has any substantial rights which may be injuriously affected by the proceedings in the cause, or if the claim against him is of a doubtful character, it is also the duty of his guardian *ad litem* to attend, before the court on the hearing, on the taking of testimony in the cause, on references to the master, and on all other proper occasions to bring forward and protect the rights of his ward. And if the guardian neglects his duty, in consequence of which the rights of the infant are not properly attended to, or are sacrificed, he may be punished for his neglect. He will also in such case be liable to the infant for all damages he may sustain. Although it is the duty of the court to protect the rights of infants, when they are properly before it, so that they may be seen and fairly understood, yet it is the special duty of the guardian *ad litem* to bring those rights directly under the consideration of the chancellor for his decision thereon. This being the duty of the guardian, it

would be improper in any case to permit the complainant to name the person who is to resist his claim against the infant.

The revised statutes have made provision for the appointment of a guardian for an infant defendant in courts of common law, where he neglects to have one appointed for himself. (2 R. S. 447, § 10, 11.) It is therefore advisable that the proceedings in this court should conform to the spirit of those provisions. There a guardian is not to be appointed for an infant, on the application of the adverse party, until the infant defendant has been duly notified and required to procure one to be appointed for himself. When the complainant applies for the appointment of a guardian for an infant defendant, under the last clause of the 144th rule, he will be entitled to an order appointing such person as shall then be designated by the court guardian *ad litem,* unless the infant, within ten days after service of a copy of such order, shall procure a guardian to be appointed for himself; and shall give notice thereof to the complainant. Such service may be made on the infant, or at his place of residence, in the usual manner, if he is of the age of 14 years or upwards. If he is under that age it should be served on his general guardian, or on his relative, friend or other person, with whom he resides. At the expiration of the ten days, on filing an affidavit of the service of the order, and that no notice of the appointment of a guardian *ad litem* has been received, the complainant may have an order of course that the former order for the appointment of the guardian named by the court, be made absolute.

In partition causes, where security is required from the guardian, the order must require the infant to procure a guardian to be appointed and to file the requisite security within the ten days, or the order for the appointment of the person named by the court will be made absolute, on his filing such security. Where the infant is a non-resident, special directions must be given by the court as to the manner of serving the order, if any notice thereof shall be deemed requisite.

In this case James Porter is appointed guardian *ad litem,* if the infant defendant shall not procure one to be appointed for himself within ten days.

Enos v. *Capps*, 12 Ill. 255. (1850.)

This was a bill in chancery filed by Capps against the plaintiffs in error and others. The bill charges that Capps had an equitable interest in certain lands, which Pascal P. Enos held as trustee for one Moore, and of which he died seized. That Moore and the heirs of Enos, are combining, etc., to deprive Capps of the land. P. P. Enos, deceased, and left a widow and several children, who were all made parties.

This writ of error is prosecuted by Susan P. Enos and Julia R. Enos, who are respectively under the age of twenty-one years, acting by Pascal P. Enos, the younger, as their next friend.

The decree sought to be reversed was rendered by Ford, Judge, at September, 1836.

TREAT, C. J.:

This was a suit in chancery brought in 1834, by Jabez Capps against John Moore, William S. Hamilton, Salome Enos widow of Pascal P. Enos, deceased, and P. P. Enos, Z. A. Enos, M. M. Enos, S. P. Enos, and J. R Enos, his heirs at law. The heirs were then all minors. The bill set up an equitable title in the complainant to a tract of land, of which Pascal P. Enos died seized; and it contained a prayer that the heirs might be required to convey the legal estate to the complainant. Process was served on all the defendants except Z. A. Enos, S. P. Enos and J. R. Enos. At the October term, 1835, Salome Enos was appointed guardian *ad litem* for the infant defendants; and at the September term, 1836, the bill was taken for confessed against all of the defendants, and a decree entered, requiring Salome Enos to convey to the complainant all of the interest of the heirs in the land. In 1847, a writ of error for the reversal of the decree was sued out in the name of all of the defendants. The complainant pleaded, that more than five years had elapsed between the entering of the decree and the suing out of the writ of error; to which the defendants replied, that two of the heirs were still infants, and within the saving clause of the statute. This court sustained a demurrer to the replication, and dismissed the writ of error. The decision was put on the ground that, as any one or more of the defendants

might under our statute have removed the case into the Supreme Court, by appeal or writ of error, and as some of them had lost their right to do so by lapse of time, they should not be permitted to avail themselves of the nonage of their co-defendants, to accomplish indirectly what the law would not allow them to do directly: See 4 Gilman, 315. This writ of error is prosecuted by S. P. Enos and J. R. Enos, who are still minors, and within the protection of the statute.

The decree was unquestionably erroneous. No answer was ever filed by the guardian *ad litem* nor was any proof introduced to sustain the averments of the bill. Neither a default, nor a decree *pro confesso* can be taken against an infant defendant. There must be a guardian *ad litem* appointed for him, and the guardian must file an answer; and the complainant must then make full proof of his right to the relief claimed. Even where the answer of the guardian admits the bill to be true, the complainant must prove the truth of his allegations with the same strictness as if the answer had interposed a direct and positive denial: *McClay* v. *Norris,* 4 Gilman, 370; *Hough* v. *Doyle,* 8 Blackford, 300. The decree, then, as to the present plaintiffs in error cannot be sustained.

Bartlett v. *Batts, 14 Ga. 539. (1854.)*

Trespass, &c., in Lee Superior Court. Decision by Judge LOVE, November Term, 1853.

William N. Batts brought his action for trespass &c. *vs.* William N. Bartlett. The infancy of the plaintiff being suggested, counsel for plaintiff moved the appointment of a guardian *ad litem,* for the purpose of prosecuting said suit; which motion was granted, and the Hon. Lott Warren was so appointed. [The father and natural guardian of the plaintiff not residing in this State.]

This decision is assigned as error by the defendants below, and plaintiff in this Court.

By the Court.—BENNING, J., delivering the opinion.

As to suits by infants, this seems to have been the state of the Law of England, at the time when that Law was introduced into Georgia.

Process might be sued out by the infant alone, but the declara-

tion could not regularly be filed before a next friend to the infant had been appointed by the Court, for prosecuting the infant's suit. If the declaration was filed before such a next friend had been appointed, the defendant might, at his option, refuse to plead, or he might go on with his defense. If he chose to go on, and did go on until a verdict had passed against him, he lost all right to object to the non-existence of a next friend in the suit. That after, verdict had become a matter which was cured by the Statutes of jeofails.

If not choosing to go on, the defendant refused to plead to the declaration, or after pleading, refused to take any other of the steps to be taken by defendants before verdict, the Court would not compel him to advance; but neither would it dismiss the infant's suit. It would merely, at that stage of the case, appoint a next friend to the infant; and having appointed one, it would consider the case as standing in the condition in which it would have stood, had a next friend been regularly appointed at the first moment, at which one might properly have been appointed.

The suit, although attended by a next friend, was the suit of the infant's. The next friend was merely an officer of the Court, appointed by the Court to look after the interests of the infant. He was not a party to the suit. (Macpherson on Inf. 352. 1 Tidd Pr. 99. 2 Saund. Rep. 117, f note (i.)—*Flight* v. *Bodand*, 4 Russ. R. 298. *Sinclair* v. *Sinclair*, 13 Mees & W. 640.

[1.] Upon the whole, it seems very safe to say, that a suit commenced and prosecuted by an infant alone, is not absolutely void; and although defective in wanting a next friend, the defect is one which, before verdict is amendable, and after verdict is cured.

[2.] The father of the infant is not the only person that is eligible to the place of next friend. Any other may be appointed by the Court, in its discretion. And when the father can be a witness for the infant, or when he neglects the interests of the infant, if another is appointed, it is done in the exercise of a wise discretion. (1 Tidd. Pr. 99, 100. 1 Danl. Ch. Pr. 94, 95.)

There does not appear to be any material difference between a next friend and a guardian, *ad litem*. (1 Tidd., 99, 100.—Macpherson on Inf. 352, 353.)

No error is apparent in the record in this case; and therefore, the decisions of the Court below ought to be affirmed.

Johnson v. *Waterhouse, 152 Mass. 585. (1891.)*

WRIT OF ERROR to reverse a judgment of the Superior Court, rendered in an action of tort to recover for personal injuries occasioned to the defendant in error by a dog owned by the plaintiff in error. The record showed that the answer in the original action contained a general denial, and alleged that the defendant at the time of the issuing out of the plaintiff's writ "was and is under twenty-one years of age." The second paragraph of the plea was as follows: "And further says that the plaintiff was a minor, as alleged, at the time of said judgment, and that he had no probate guardian or legally appointed guardian *ad litem;* but that he was in fact represented and defended in said action, in which judgment was recovered, by his father and mother, and that said action was twice tried by a jury, and at both trials the father and mother were present in said Superior Court, and were represented by counsel, and defended said action on behalf of said petitioner."

At the hearing, before Field, J., the facts contained in the second paragraph of the plea were admitted to be true, and the judge reserved the case for the consideration of the full court.

C. ALLEN, J.:

The general rule is well established, that a judgment cannot properly be rendered against an infant defendant in a civil suit, unless he has a guardian who may defend the suit in his behalf; and if a judgment is so rendered, the infant is entitled to maintain a writ of error to avoid the same. *Crockett* v. *Drew,* 5 Gray, 399. *Swan* v. *Horton,* 14 Gray, 179. *Farris* v. *Richardson,* 6 Allen, 118. *Mansur* v. *Pratt,* 101 Mass. 60. *Cassier's case,* 139 Mass. 458.

In the present case, the plea avers that the plaintiff in error was an infant at the time of the rendering of the judgment, and had no probate guardian or legally appointed guardian *ad litem,* but was in fact represented and defended in the action by his father and mother, who were present in court at the trial, and were represented by counsel, and defended the action on his behalf. The defendant in error contends that these facts will supply

the want of a guardian regularly and formally appointed, and that under these circumstances the infant is not entitled to maintain his writ of error.

Such appears to be the rule adopted in Vermont. *Priest* v. *Hamilton,* 2 Tyler, 50. *Wrisley* v. *Kenyon,* 28 Vt. 5. *Fuller* v. *Smith,* 49 Vt. 253. The case cited from Mississippi does not appear to us to go so far, as there a husband was authorized by statute to appear for his infant wife, so that no guardian *ad litem* for her was deemed necessary. *Frisby* v. *Harrisson,* 30 Miss. 452. No other decision has been cited by counsel which goes so far as the Vermont cases, and after some examination we have found none. The practice of having a regularly appointed guardian rests on good reasons. It has been said that the duty of watching over the interests of infants in a litigation devolves in a considerable degree upon the court. *Bank of United States* v. *Ritchie,* 8 Pet. 128, 144. This duty is performed in the first instance by seeing that an infant is represented by a guardian who is suitable to protect his interests in the particular case. The father is usually a proper person to act as such guardian, but not always. There is an obvious advantage in having the fitness of the person who is to act as guardian determined in the first instance, rather than after the trial is over. It was held in *Brown* v. *Severson,* 12 Heisk. 381, that where an infant's mother, who was named as his guardian, in his father's will, had appeared in a suit as his guardian, and answered as such, and had been recognized by the court as guardian, the judgment should not be set aside, though no formal appointment as guardian appeared of record. In the case now before us, the infant's parents did not file an answer as his guardians, nor assume to act formally as such, and there is nothing to show that the court recognized them as his actual guardians, or acted upon the assumption that they were such. They were simply his parents. It is laid down in Macpherson on Infants, 353, that no legal right of parentage or of guardianship will enable any one to act for the infant without an appointment as guardian. If there is no guardian of an infant defendant, the plaintiff must bring the matter to the attention of the court, and see to it that one is appointed. *Swan* v. *Horton,* 14 Gray, 179. *Shipman* v. *Stevens,* 2 Wils. 50. *Clarke* v. *Gilmanton,* 12 N. H. 515. *Mason* v. *Denison,* 15 Wend. 64, 67. In *Letcher* v. *Letcher,* 2 Marshall, 153, the mother of infant defendants, who was also

herself a defendant, answered for them as their guardian; but she did not appear to have been appointed to defend for them, and the judgment against them was reversed. See also *Irons* v. *Crist,* 3 Marshall, 143; *Searcey* v. *Morgan,* 4 Bibb, 96; *Pond* v. *Doneghy,* 18 B. Mon. (Ky.) 558. In *Swain* v. *Fidelity Ins. Co.* 54 Penn. St. 455, an attorney appeared for an infant at the instance of his mother; but this was held to be insufficient. In *Colman* v. *Northcote,* 2 Hare 147, Vice Chancellor Wigram refused to receive the answer in equity of a married woman, who was an infant, either separately or jointly with her husband, until a guardian should have been assigned to her. The fact that there are adult defendants joined with an infant defendant, and that all appear by the same attorney, will not avail to prevent the infant from obtaining a reversal of the judgment. *Goodridge* v. *Ross,* 6 Met. 487. *Castledine* v. *Mundy,* 4 B. & Ad. 90. 2 Saund. 212a, note 4. The father of an infant soldier is not entitled to his bounty money, nor to money paid for his enlisting as a substitute in the army. *Banks* v. *Conant,* 14 Allen, 497. *Kelly* v. *Sprout,* 97 Mass. 169. *Taylor* v. *Mechanics' Savings Bank,* 97 Mass. 345. Nor has a father as such a right to demand and receive a legacy to his infant child. *Miles* v. *Boyden,* 3 Pick. 213, 218. *Genet* v. *Tallmadge,* 1 Johns. Ch. 3. When an infant sues by *prochein ami,* in theory of law the *prochein ami* is appointed by the court, and his authority to act may be revoked by the court. *Guild* v. *Cranston,* 8 Cush. 506.

It seems to us that it is more in accordance with the general current of decisions, and with sound principles, to hold that the facts stated are insufficient to show that the plaintiff in error is bound by the judgment rendered against him. Certainly he ought not to be bound by the appearance of his father and mother for him, unless in point of fact they were suitable persons to represent him in the particular case, and to defend his interests; and the proper time for making the inquiry whether they were so is past. The original answer disclosed the fact of infancy, and the original plaintiff, the present defendant in error, might have had a guardian *ad litem* appointed by making an application to the court.

According to the practice under the statutes of this Commonwealth, even where a judgment is found to have been erroneous by

reason of an error in fact, the entry must be judgment reversed. Pub. Sts. c. 187, § 2. *Packard* v. *Matthews,* 9 Gray, 311.

Judgment reversed.

McDermott v. *Thompson, 29 Fla. 299. (1892.)*

Appeal from the Circuit Court for Monroe county.

The facts in the case are stated in the opinion of the court.

(Judge Malone, of the Second Circuit, sat in the place of Mr. Chief Justice Raney, who was disqualified.)

Taylor, J.:

On the 20th day of January, 1882, John L. McDermott filed his bill in equity in the Circuit Court of Monroe county, Sixth Judicial Circuit, against John E. Thompson, as executor of the will of Olivia Gibbons, deceased, and against George Edward and Thomas Eugene Gibbons, minor children of Olivia Gibbons, deceased, praying that the last will of Olivia McDermott, who was formerly, before her marriage with McDermott, called Olivia Gibbons, made before her marriage with McDermott, be set aside as illegal and void, and for an accounting by John E. Thompson as the executor of such will, &c.

John E. Thompson, as executor, answered. Testimony was taken and the cause submitted to the chancellor, and a final decree therein was rendered in the court below on the 24th of April, 1882, setting aside the will and declaring it to have been revoked because of the fact that it was made by the testatrix prior to her second marriage, devising all of her property to children by former marriage, and having had issue of a son by her second marriage with McDermott who was not provided for by said will. From this decree the cause was appealed to this court, and this court at the January Term, 1883, rendered a decision therein (19 Fla., 852) reversing the decree of the court below because of the failure to make the minor children of Olivia Gibbons by her first marriage parties to the suit by proper service upon them of process in the cause, and because of the want of proper answer for such minors through a guardian *ad litem.* In the former decision of this court in the cause it was distinctly decided that the subpœna in the cause should be served upon the minors in person, and

upon a guardian ad litem for them *appointed by the court,* and that the service on the minors should be in the presence of their legal guardian, if they have one, or in the presence of such person as had for the time being the actual care or custody of such minors. After the decision of this court subpœna seems to have been issued to such minors, but the return of service thereof is defective because it does not show the names of the minors upon whom it was served, neither does it show that it was ever served upon any guardian *ad litem* for such minors appointed by the court. On the 2d day of June, 1883, after the service of subpœna on the minors, of which the imperfect return was made as aforesaid, G. Bowne Patterson, as guardian *ad litem* for the minors, George E. and Thomas E. Gibbons, interposed a demurrer to the bill. This demurrer was subsequently on September 11th, 1884, sustained by the court below, and the bill dismissed; and from this order the cause is appealed a second time to this court. How, or by what authority, G. Bowne Patterson got into the cause as guardian *ad litem* for these minors, we have been unable to discover from anything in the record. There is no order of court appointing and authorizing him to act in that capacity, and there is no subpœna directed to or served upon him, citing him in that or any other capacity to appear and answer for and on behalf of said minors. We are constrained to conclude from this status of the record that the requirements of the former decision and mandate of this court have not been complied with, and that the said minors are not yet properly before the court. With that decision we are fully in accord. It pointed out with sufficient particularity what was necessary to be done in order to get the minors properly before the court; 1st, that a guardian *ad litem* should be appointed by the court for such minors; 2d, that such minors should be personally served with subpœna in the presence of their legal guardian, or in the presence of such person who had the care and custody of them; and 3d, that such guardian *ad litem* should be served with subpœna in the cause. None of these requisites have been complied with. It follows that all the proceedings and orders had and made in the cause since the former decision of this court in the premises must be set aside and reversed, with directions to supply the omissions in the proceedings therein, and herein pointed out, and it is so ordered.

Suits by and against Persons Mentally Incompetent.

Dorsheimer v. *Roorback, 18 N. J. Eq. 438. (1867.)*

This was a motion on part of the defendant to order the bill to be taken from the files, on the ground that the complainant was an idiot, and the bill was filed in her name by one Couse, as her next friend, he not having been appointed her guardian upon inquisition found, or been authorized by this court in this case to file the bill as her next friend.

The Chancellor:

The motion is made by the defendant, and not on part of the idiot, or any one in her behalf. But in this case, where it is alleged in the bill that complainant is an idiot *a nativitate,* and unable to manage her affairs, and sues by a person calling himself her next friend, without any appointment, if the proceeding is not according to law, and not binding on the idiot, the defendant must make this motion to protect himself from being obliged to defend a suit brought without authority.

Idiots and lunatics may sue at law by next friend, to be appointed by the court; but in equity, must sue by the committee or guardian of their estates duly appointed. When the idiocy or lunacy is not partial, and, in all cases, when it has been found on an inquisition, a court of equity will not allow a suit to be brought by an idiot or lunatic in his own name, or that of a next friend, nominated by himself, or appointed by the court; his guardian or committee must join in the suit. When a person is only partially incapable, as one merely deaf and dumb, the court will appoint a next friend to be joined with him in the suit, and to conduct it for him.

The authorities all agree that idiots and lunatics *must* sue in equity, by their committees or guardians. In this state, the persons to whom the estates of idiots and lunatics are committed upon inquisition found, are styled their guardians; in many of the other states, and in England, they are called their committees.

Shelford on Lunatics, 415, says: "Idiots and lunatics *must* sue in courts of equity by their committees." In Story's Eq. Pl., § 64; 1 Daniell's Chan. Pr. (3d ed.) 79; Stock on Non Compotes Mentis, 33; Mitford Eq. Pl. 29, and 2 Barb. Chan. Pr. 224, the same rule

is laid down; and it is further stated by some of these authorities, that a suit ought not to be brought, even by the committee, without the direction of the court, upon an inquiry made, whether it is for the benefit of the idiot or lunatic. I find no case or authority in which it is held that they may sue by a next friend, either a volunteer or appointed for the purpose.

The only semblance of authority found, is the passage in Shelford 416, and copied in 1 Daniell's Ch. Pr. 81: "If a person exhibiting a bill, appear upon the face of it to be either an idiot or a lunatic, and no *next friend* or committee is named in the bill, the defendant may demur." Daniell cites *Fuller* v. *Lance,* 1 Ch. Cas. 19, which has nothing in it on this point. Shelford cites Mitford on Pl. 153, which says: "If an *infant or a married woman,* an idiot or a lunatic, appear to be such on the face of the bill, and no next friend or committee is named, the defendant may demur."

Lord Redesdale evidently intends to refer *singula singulis,* and does not mean to imply that a next friend is proper for an idiot or lunatic, any more than that a committee is necessary for an infant or *feme covert.* This passage has been adopted by the other two writers, without noticing that the words next friend were not applicable to the subject of which they were then treating—idiots and lunatics.

The rule is a wise one. It should not be permitted that any volunteer should, by styling himself the next friend of an idiot, bring a suit for him, and lose or jeopard his rights by an action brought inopportunely, and it may be, prosecuted without skill or honesty. The idiot would have no security for the amount recovered by such next friend, and the defendant could not pay him, or settle with him, safely.

The motion to take the bill from the files must be granted.

Roughan v. *Morris, 87 Ill. App. 642. (1899.)*

STATEMENT.—This is an appeal from an interlocutory order appointing a receiver.

The bill of complaint was exhibited by James L. Morris, by Arthur Morris, his brother and next friend. The bill alleges that James L. Morris is an insane person; that he is a widower and

had no children, and that Arthur Morris, who appears as his next friend in the suit, and George Morris, his two brothers, are his next of kin. The bill also alleges that the defendant, Michael J. Roughan, procured the signature of James L. Morris to a certain pretended power of attorney, giving the defendant full control and dominion over all the property of said Morris, consisting of a large business and real estate, improved and rented; that for a considerable space of time said Roughan had been in complete and undisturbed possession of said property; that said Roughan had made no report of any of his doings in the premises; that by reason of his management the business was becoming deeply involved, was likely to be ruined, and the income of Morris destroyed, unless the same was cared for; that the creditors of the complainant were refusing to grant any more credit to the business so long as it was under the control of the defendant; that the landlord was about to levy a distress warrant for non-payment of rent, and that if the assets of the complainant were properly applied this would be wholly unnecessary; that defendant had collected and disposed of, to his own use, large sums of money belonging to complainant; that the defendant fails and neglects to pay the debts of the estate, and willfully and maliciously permits the estate to become more and more indebted; that the defendant is insolvent, irresponsible, and not a proper person to conduct said business; that about five weeks must necessarily elapse before the matter of the insanity of Morris can be heard in the Probate Court of Cook County, where a petition has been filed by Arthur Morris and George Morris, brothers and next of kin of complainant, asking for the appointment of a conservator.

The prayer of the bill is *inter alia* for the appointment of a receiver to collect the rents of real estate owned by James L. Morris, and to manage the business of said Morris until a conservator can be appointed by the Probate Court of Cook County.

Upon the application for appointment of a receiver, a hearing was had upon bill of complaint and affidavits, and oral testimony. An interlocutory order was entered appointing one Frank D. Kitchner as receiver. This appeal is from that order.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

But one question of controlling importance is presented upon

this appeal, viz.: whether the suit may be entertained for the purpose indicated when commenced by an insane person by his next friend.

The grounds for the intervention of a court of chancery are here ample, if the suit were brought by a complainant of sound mind and in his own name. The relation of the parties, the insolvency of defendant, the refusal or failure to account, and the waste alleged, constitute sufficient ground for intervention of a court of equity, if the suit were brought by John L. Morris of sound mind. The question then is, he being a lunatic, could the suit be brought by his brother as his next friend?

The statute, Sec. 13, Chap. 86, R. S., provides as follows in relation to conservators:

"He shall appear for and represent his ward in all suits and proceedings unless another person is appointed for that purpose, as conservator or next friend; but nothing contained in this act shall impair or affect the power of any court to appoint a conservator or next friend to defend the interests of said ward impleaded in such court, or interested in a suit or matter therein pending, nor its power to appoint or allow any person as next friend for such ward to commence, prosecute or defend any suit in his behalf, subject to the direction of such court."

Could the court then allow Arthur Morris, as next friend, to maintain this suit for the purpose disclosed by the bill?

It is contended by appellant that the question is determined adversely to the maintenance of the suit by the decision of our Supreme Court in *Covington* v. *Neftzger,* 140 Ill. 608. If the purpose of this suit were merely the termination of the agency created by the power of attorney to appellant and for an accounting, we think it clear that the case would be governed by the Covington case, and that the bill would not lie for such purpose when brought by one volunteering as next friend. But here the purpose of the bill is merely to conserve the estate until a conservator might be appointed by the Probate Court.

It would seem upon principle that a court of chancery should have the power to protect the estate of an insane person until a conservator could be appointed by the Probate Court, to which jurisdiction the appointment of conservators of insane persons is committed by the law of this State. The jurisdiction of the chancellor here, to thus appoint this receiver, can not be maintained

upon the ground alone that the subject-matter of the suit is a matter proper for equitable cognizance, that is, the agency, the waste, and the right to an accounting, for in respect to such relief as the complainant might be entitled to in these matters, the suit could not be maintained by one volunteering as next friend, under the decision in the Covington case. But it would seem that the suit may be maintained under the general chancery power to protect the estates of lunatics, and for the limited purpose of such protection only as could be shown to be necessary until a conservator might be appointed by the Probate Court.

In England the care of lunatics and their estates was vested in the sovereign, and although the exercise of this care and control was delegated by the sovereign to the chancellor, yet it was always treated as a special prerogative of the crown, and not as a matter within the general chancery powers.

The question of the inherent powers of our courts of chancery in relation to this subject has been treated differently in different States. In some States it has been held that the subject had so far become a matter of chancery jurisdiction in England, that when by constitution or statute the powers and jurisdiction of the Court of Chancery of England were given to our courts of chancery, this element of jurisdiction was thereby conferred. In others it has been held that the power which the English chancellor exercised in this behalf was not a judicial power, but a delegated prerogative right, derived from the crown, and by special delegation in each instance. But the courts so holding have, at least in some cases, also held that when there was no special provision by the commonwealth giving courts of chancery this jurisdiction and power, yet it was to be considered as arising *ex necessitate* for the protection of the persons and property of the commonwealth.

Whether the conclusion that our courts of chancery have this jurisdictional power is reached by the one process of reasoning or the other, is of little importance. It may be regarded as well settled in our State that the power exists in a court of chancery to conserve the estate of a lunatic, when such action is necessary. *Dodge* v. *Cole*, 97 Ill. 338.

The question then is, whether such protection may be extended by a court of chancery for the period only which must intervene before a conservator can be appointed by a court of probate. The

only contention to the contrary is based upon the decision in the case of *Covington* v. *Neftzger, supra.* The gist of the decision in that case is expressed in the following language of the court:

"A person suing as next friend has no authority to bind the lunatic or his estate. * * * It would be a dangerous rule to hold that such a person might, at his own will or discretion, come into court for the purpose of impeaching a transaction in which he has no interest, as trustee or otherwise, and over which he has no control. * * * We think it is a well settled principle that the person who brings a bill to avoid the deed of an insane person, must have power to act for such person and bind him and his estate."

The court also considered whether the rule of the trial court upon Covington, the next friend, to file a bond for costs, amounted to an order authorizing him to sue. It seems clear that the court did not intend to hold that the trial court might not in any case "allow" a suit to be maintained by a next friend, and did not construe the section of the statute above set forth to that effect. What the decision does hold is that a volunteer can not thus elect to set aside the deed of the lunatic. And there is a distinction indicated between an attempt to procure equitable relief in chancery by setting aside a deed for a lunatic who appears only by next friend, and an effort merely to protect the estate of the lunatic through a suit brought by next friend until a committee or conservator can be appointed to represent him.

The case of *Jones* v. *Lloyd,* 18 Law Rep. Eq. Cas. 265, which is cited in the Covington case and quoted from for the express purpose of illustrating this distinction, would seem to precisely apply to the conditions here presented. In that case the court said:

"Can a suit be instituted by a lunatic, not found so by inquisition, by his next friend? I have no doubt it can. There is authority upon the subject, and it seems to me so distinct that I have no occasion, really, to refer to the reason, for I think the cases of *Light* v. *Light* (25 Beav. 248), and *Beall* v. *Smith* (Law Rep. 8 Ch. 85), are such authorities; but independently of the unreported case of *Fisher* v. *Nelles,* where I know the point was discussed, and independently of authority, let us look at the reason of the thing. If this were not the law, anybody might, at his will and pleasure, commit waste on a lunatic's property, or do damage

or serious injury and annoyance to him or his property, without there being any remedy whatever. In the first place, the Lord Justices or the Lord Chancellor are not always sitting for applications in lunacy. In the next place, if they were, everybody knows it takes a considerable time to make a man a lunatic by inquisition. * * * Is it to be tolerated that any person can injure him or his property without there being any power in any court of justice to restrain such injury? Is it to be said that a man may cut down trees on the property of a person in this unfortunate state, and that because no effort of his can be made, no member of his family can file a bill in his name as next friend, to prevent that injury? Is it to be allowed that a man may make away with the share of a lunatic in a partnership business, or take away the trust property in which he is interested, without this court being able to extend its protection to him by granting an injunction at the suit of the lunatic by a next friend, because he is not found so by inquisition? I take it those propositions, when stated, really furnish a complete answer to the suggestion that he can not maintain such a suit. Of course they do not answer the question as to how far he may carry it; but that he can maintain such a suit for the purpose of protection, for the purpose of obtaining, as in this case, a receiver, I should think there can be no doubt whatever."

Other decisions holding to like doctrine are: *Reese* v. *Reese,* 89 Ga. 645; *Whetstone* v. *Whetstone,* 75 Ala. 495.

We are of opinion, therefore, that while under the decision in the Covington case this suit brought by next friend might not be maintained for the ultimate purpose alone of annulling the deed by which the agency of the defendant was created, nor for the obtaining of an accounting alone, yet it may be maintained for the sole purpose of protecting the estate of the lunatic, through a receivership, until a conservator can be appointed to act for him.

The order is affirmed.

CHAPTER II.

PARTIES TO A SUIT IN EQUITY.

Parties Classified.

Chadbourne v. *Coe, 10 U. S. App. 78. (1892.)*

Reuben W. Chadbourne, a citizen of the State of Wisconsin, filed his bill in equity in the Circuit Court of the United States for the District of Minnesota against Orlen P. Whitcomb, a citizen of the State of Colorado, and James N. Coe, a citizen of the State of Minnesota, alleging that Whitcomb was indebted to the complainant in a sum exceeding five thousand dollars upon certain promissory notes set out in the bill; that Whitcomb was insolvent, and that to hinder, delay and defraud his creditors he had by deeds conveyed certain real estate, and by bills of sale transferred certain personal property, to Coe upon certain secret trusts in writing, which instruments creating the alleged trusts are made exhibits to the bill. The last in date of these alleged trust agreements included all the property, real and personal, conveyed and transferred by Whitcomb to Coe, and the powers conferred and trusts imposed on Coe thereby are as follows:

"Now, in consideration of the premises I, the said Orlen P. Whitcomb, hereby authorize and fully empower the said James N. Coe to sell, exchange or dispose of any and all of the said property mentioned in the agreements hereinbefore referred to, which has not been already disposed of, together with all of the personal property hereby conveyed to said Coe, to such person or persons, and for such prices and on such terms as said Coe shall see fit, hereby granting unto said Coe full and exclusive authority to manage, dispose of and control said property or any thereof as he shall see fit, and hereby fully investing him with all the rents, profits and increase of said property, both real and personal, and giving him full authority to execute and deliver any and all conveyances or instruments necessary or proper to convey or dispose of, or in the management of, the same without obtaining my consent thereto; and the net proceeds, either cash, securities or other

property derived from the sale of any of said property, or the rents, profits or increase thereof, said Coe is hereby authorized and directed to hold and apply, when reduced to money, on any sum or sums of money now due or hereafter owing to said Coe from said Whitcomb, and on any indebtedness incurred in the management of said property or taxes paid, and on any and all liabilities now or at any time hereafter incurred by said Coe for said Whitcomb, as surety or otherwise, and after the satisfaction and payment of all such claims and indebtedness whatsoever, the balance thereafter to be paid to said Whitcomb."

It is alleged that Whitcomb has no other property out of which the complainant can make his debt. The prayer of the bill is that the conveyances of Coe be set aside, that the trust agreements be declared void, and that Coe be required to account; that the real estate be sold and the complainant's debt paid out of the proceeds and the moneys received from Coe on the accounting. The complainant died, and the suit was revived in the name of Catherine E. Chadbourne and Smith W. Chadbourne, his executors. Whitcomb appeared specially and filed a plea to the jurisdiction of the court upon the ground that he was a citizen of Colorado, which plea was sustained, and the bill was dismissed as to him. No complaint is made of this ruling, touching which the counsel for the appellants in their brief say: "Whitcomb was originally made a defendant, but he was dismissed upon filing a plea to the jurisdiction, and, as we think, properly, under the act of August 13, 1888, defining the jurisdiction of Federal courts, and no exception is taken to the dismissal." After the suit was dismissed as to Whitcomb, Coe filed a demurrer to the bill for want of proper parties, which the court sustained and entered a decree dismissing the bill without prejudice, and the complainants appealed. In the brief of the counsel for the appellants it is said: "The only question for the consideration of this court is whether or not the Circuit Court erred in sustaining the demurrer upon the ground that Whitcomb is not a party to the action." The opinion of the Circuit Court dismissing the bill is reported in 45 Fed. Rep. 822.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The Supreme Court of the United States divide parties to suits in equity into three classes: First, formal parties; Second, neces-

sary parties; Third, indispensable parties. Formal parties are those who have no interest in the controversy between the immediate litigants, but have an interest in the subject-matter which may be conveniently settled in the suit and thereby prevent further litigation. They may be parties or not at the option of the complainant. Necessary parties are those who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does complete and full justice between them. Such persons must be made parties, if practicable, in obedience to the general rule which requires all persons to be made parties who are interested in the controversy, in order that there may be an end of litigation; but the rule in the Federal courts is, that if they are beyond the jurisdiction of the court, or if making them parties would oust the jurisdiction of the court, the case may proceed to a final decree between the parties before the court, leaving the rights of the absent parties untouched, and to be determined in any competent forum. The reason for this liberal rule in dispensing with necessary parties in the Federal courts will be presently stated. Indispensable parties are those who not only have an interest in the subject-matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Shields* v. *Barrow,* 17 How. 130, 139; *Ribon* v. *Railroad Companies,* 16 Wall. 446, 450; *Coiron* v. *Millaudon,* 19 How. 113; *Williams* v. *Bankhead,* 19 Wall. 563; *Kendig* v. *Dean,* 97 U. S. 423; *Alexander* v. *Horner,* 1 McCrary, 634. .

The general rule as to parties in chancery is that persons falling within the definition of necessary parties must be brought in for the purpose of putting an end to the whole controversy, or the bill will be dismissed; and this is still the rule in most of the state courts. But in the Federal courts this rule has been relaxed. The relaxation resulted from two causes: First, the limitation imposed upon the jurisdiction of these courts by the citizenship of the parties; and Second, by their inability to bring in parties out of their jurisdiction by publication. The extent of the relaxation of the general rule in the Federal courts is expressed in the forty-seventh equity rule. That rule is simply declaratory of

the previous decisions of the Supreme Court on the subject of the rule. The Supreme Court has said repeatedly, that, notwithstanding this rule, a Circuit Court can make no decree affecting the rights of an absent person, and that all persons whose interests will be directly affected by the decree are indispensable parties. *Shields* v. *Barrow, supra; Ribon* v. *Railroad Companies, supra; Coiron* v. *Millaudon, supra; Alexander* v. *Horner, supra; The Cole Silver Mining Company* v. *The Virginia and Gold Hill Water Company,* 1 Sawyer, 685.

Can a decree be made in this case without affecting the rights of Whitcomb? Before the complainants can have the specific relief sought by the bill, the court must find and decree: First, that Whitcomb is indebted to the complainants in the sum of $5,000 more or less as alleged in the bill; Second, that Whitcomb is insolvent; Third, that the deeds from Whitcomb to Coe are fraudulent and void as to Whitcomb's creditors; Fourth, that the agreement between Whitcomb and Coe relating to the sale of the property and an accounting for the same, and for the rents and profits thereof, is fraudulent and void; Fifth, that the lands be sold and that the proceeds of the sale be applied to the payment of Whitcomb's alleged indebtedness to the complainants; and Sixth, that Coe account for the property and its rents and profits, and that he pay the amount found due to the complainants on Whitcomb's alleged indebtedness to them. If the complainants are not creditors of Whitcomb, as they allege; or if Whitcomb is not insolvent; or if the deeds Whitcomb made to Coe are not fraudulent; or if the contracts set out between Whitcomb and Coe are valid, the bill cannot be maintained. In the judicial determination of every one of these issues Whitcomb is an indispensable party. As to some of them he is necessarily the only party in interest; the only party who would be affected by the decree, and the only party capable of making an intelligent defence.

The contracts or trust agreements between Whitcomb and Coe made part of the bill are not fraudulent on their face. Upon their face they are valid agreements, under which Whitcomb can compel Coe to account for the property, and its rents, issues and profits. If the court in a suit to which Whitcomb was not a party should compel Coe to account for, and turn over, the property and money to the complainants, such a decree would be no bar to a suit by Whitcomb against Coe to compel the latter to account to him

according to the terms of the agreement between them, and for this reason Coe has a right to insist that Whitcomb shall be made a party for his protection. *Alexander* v. *Horner, supra.*

Formerly the general rule was that a judgment must be obtained and execution returned *nulla bona,* or its equivalent, before a bill could be filed to vacate a fraudulent conveyance, and it was held that the debtor was a necessary party to such a bill. In modern times this rule has by legislation in some of the States, and by judicial decisions in others, undergone important modifications not necessary to be noticed in the decision of this case. The cases on the subject are collected in 3 Pomeroy's Eq. Jur. § 1415, note 4; Story's Eq. Pl. (10th ed.), § 233, note *(b)*; Pomeroy on Remedies and Remedial Rights, § 347. But the modern cases which go to the greatest length in modifying the old rule fall far short of supporting the complainants' contention in this case. In this case there is not only no judgment, but it is contended that the alleged debtor has no right to be heard on the question as to whether he owes the complainants anything for which a judgment should be rendered.

We do not rest our decision upon the ground that a creditor cannot file a bill to set aside a fraudulent conveyance of his debtor and subject the property to the payment of his debt until he has obtained a judgment at law for his debt and had a return of *nulla bona* (as to which see *Case* v. *Beauregard,* 101 U. S. 688); but upon the ground that a creditor cannot maintain a bill to establish a debt against his alleged debtor, to annul the debtor's conveyances and contracts, and appropriate his property and money to the payment of the creditor's alleged debt, without making the debtor a party of the bill seeking such relief. It is fundamental in the jurisprudence of this country that no court, and, least of all, a Federal court, can adjudicate upon the rights of one not before it and not subject to its jurisdiction.

The decree of the Circuit Court is

Affirmed.

JOINT PLAINTIFFS.

Brunner v. *Bay City*, *46 Mich. 236.* (1881.)

APPEAL from Bay. Submitted June 8. Decided June 15.

Bill to set aside tax sales and vacate sewer assessment. Defendants appeal. Reversed; bill dismissed.

CAMPBELL, J.:

This is a bill filed by a large number of persons whose lots have been bid in by Bay City under a sewer assessment to have the sales set aside as illegal. The ground of illegality is that the sewer itself was not authorized to be built, nor the assessments authorized to be made in the manner adopted.

Without going at length into the question presented, we are met at the outset by a difficulty which we cannot overlook. We do not find any warrant for any such joinder of grievances. The city now occupies the same position which would be occupied by any other tax purchaser who might choose to bid off all of these parcels. Each complainant would have against him a single separate grievance, but it would not in law be a common grievance, merely because it was similar in its nature to the grievances of others. The assertion of his title against one would be by a separate action, and his action of ejectment could not implead any persons not interested in the parcel it involved. Matters in which there is no common interest on the one side or the other are not allowed to be litigated jointly; and while there are some classes of cases where the community of interest is not as plain as in others, we do not think they go far enough to warrant this suit.

The joinder of several parties similarly interested in resisting a common aggressor was ordinarily allowed, to save multiplying litigation, to settle once and finally the matter in contention. It was at first strictly confined to cases where the act complained of, if done, or continued, would affect every one in the same way, and would affect all, if any. It was applied in questions of commons in pasturage, fisheries, and similar interests, and in questions of tithes, which were asserted over certain districts. It was extended on the same grounds to frauds or wrongs by corporate agents against the interests of corporators, public and private. It was

finally applied to restrain taxes and assessments, in which the inhabitants of localities taxed, or the owners of land in assessment districts, were sought to be charged for a common burden. There is no doubt that in some of these cases the rule may have been extended somewhat beyond the line first laid down. But in all of the cases which have been well considered, there has been one cause of grievance which at the time of filing the bill involved some aggressive action in which all of the parties complaining were involved in precisely the same way. And we have held distinctly that in such actions, if any person set up grievances not of the same common nature with those of the rest, the bill could not be maintained. *Kerr* v. *Lansing,* 17 Mich. 34. See also *Miller* v. *Grandy,* 13 Mich. 540 and *Scofield* v. *Lansing,* 17 Mich. 437; *Youngblood* v. *Sexton,* 32 Mich. 406.

In the present case it may be doubted whether the complainants could have joined in a suit to enjoin the assessment, however illegal. The chief objection underlying the whole theory of the bill is that the assessment was not and could not lawfully be made upon any general and uniform system of apportionment; but that each lot should be assessed, not an aliquot part of a general charge, but so much as it was separately benefited by the work. It is very evident that each complainant is interested in enlarging the responsibilities of the rest and in diminishing his own. Instead of a community of interest their interests are hostile.

But when the assessment has been enforced by sale, we can see no reason why one purchaser should differ from another, or why the purchase of several lots should be regarded as a common wrong to the several lot-owners. He is not after his purchase capable of doing any act which can operate as a common grievance. Each act in the enforcement of his title is an independent and several injury, if it is a wrong at all, and no lot-owner is hurt by the wrong done to his neighbor. It would be like the exclusion of a person from a common or fishery, on personal grounds, and not on a denial of the general right. No joinder of complaints could be allowed in such cases.

We think Bay City cannot be sued in this way, and that if any lot-owner has an equitable grievance against the sale of his lot actually made, he must sue for it separately.

The decree must be reversed with costs and bill dismissed.

COOLEY and GRAVES, JJ., concurred.

MARSTON, C. J., being a resident tax-payer of Bay City, did not sit in this case.

Murray v. Hay, 1 Barb. Ch. (N. Y.) 59. (1845.)

This was an application, on the part of the complainants, to open an order entered by the defendant to close the proofs, and to allow farther time for the complainants to take testimony in this cause. And a second application was made, for leave to amend the complainant's bill, by striking out the name of Murray as one of the complainants therein.

The defendant's solicitor, on the 10th of June, 1835, entered an order that the complainants produce witnesses in this cause within forty days after notice of the order, and served a notice of such order upon the solicitor for the complainants the same day. On the 18th of July, the solicitor for the complainants mailed an affidavit, directed to the chancellor, and obtained his fiat for an order, founded thereon, extending the time to produce proofs until the 1st of October. The fiat was received on Monday the 21st of July, the second day after the great fire in New York; and the order was entered the same day, but was not served until the afternoon of the 22d, owing to the derangement of business produced by the fire. Previous to the receipt of notice of the order, the defendant's solicitor had entered an order to close the proofs; which, under the instructions of his client, he refused to open. The application for leave to amend was made upon the supposition that an objection for a misjoinder of complainants could be sustained; the bill having been filed by two persons, who were owners of different dwelling houses in severalty, having no joint interest in either of them, to restrain an alleged nuisance which was a common but not a joint injury to both of the complainants.

THE CHANCELLOR:

The objection that the order to produce witnesses was not entered in the proper form is not well taken. By the practice of the English court of chancery, and as it formerly existed here, either party who wished to close the proofs was obliged to enter a rule that the adverse party produce his witnesses; and at the

expiration of the time allowed by that order, he entered the order nisi to pass publication. By this last order both parties were precluded from examining farther witnesses, after the expiration of the eight days, unless an order to enlarge publication had been obtained in the meantime. (2 Dan. Ch. Pr. 562. 1 Smith's Ch. Pr. 252.) The rules of this court, however, have altered the practice so far as to allow either party to enter a forty day order to produce witnesses, upon which the party entering such order, or the adverse party, may proceed and obtain an absolute order to close the proofs after the expiration of the time allowed by the first order, unless the time shall be enlarged by a special order of the court. (Rule 68.) But the mere authority to one party to enter an order to close the proofs, upon an affidavit of the receipt of a notice from the adverse party of an order to produce witnesses, did not necessarily require a variance in the form of the first order. The order to produce witnesses may therefore be in the form originally used, requiring the adverse party to produce witnesses within forty days. Or it may be in the form contained in the precedents of Barbour and of Hoffman, requiring *the parties* to produce witnesses, &c.; which is according to its legal effect, under the new rule of this court upon the subject. The order to close the proofs was therefore strictly regular; although the form of the preliminary order entered by the defendant did not in terms require the defendant himself, as well as the complainant, to produce witnesses within forty days. For, upon filing an affidavit of the receipt of notice of such an order as was entered in this case, the complainant could himself have entered an order to close the proofs, at the expiration of the specified time.

But as the complainants had actually obtained the fiat of the court, and had entered an order thereon, enlarging the time to produce witnesses, within the time allowed for that purpose by the practice of the court, the service of which order was delayed by mere accident, the order to close the proofs should be opened upon payment of costs. The excitement and confusion necessarily produced among business men in New-York by the great fire on the previous Saturday, is sufficient of itself to excuse, or account for, the delay in serving the order immediately after it was entered. The order to close the proofs must therefore be vacated, and the time to produce witnesses is extended to the first of November next, inclusive. And the complainants are to

pay to the defendant's solicitor $15 for his costs of entering the order to close the proofs, and noticing the cause for hearing, and opposing this application to open such order.

The application to amend, by leaving out the name of one of the complainants, should also be granted, upon such terms as will effectually protect the defendant as to costs, &c.; if there is in fact a misjoinder of the complainants, which may be fatal to their suit at the hearing. Upon an examination of the question, however, I am satisfied there is no misjoinder of complainants, so far as the bill seeks to restrain the continuance of a nuisance which was a common though not a joint injury to both of the parties who have filed this bill. There is no inflexible rule on the subject of joinder of parties in this court. But, as a general principle, several complainants, having distinct and independent claims to relief against a defendant, cannot join in a suit for the separate relief of each; nor can a single complainant, having distinct and independent claims to relief against two or more defendants severally, join both or all of them in the same bill. There are, however, many exceptions to this general principle; and the court exercises a sound discretion in determining whether there is a misjoinder of parties, under the particular circumstances of the case. Thus in the case of *Kensington* v. *White* (3 Price's Rep. 164), the court of exchequer in England overruled a demurrer for multifariousness, which was put in to a bill, filed by seventy-two different underwriters upon policies for the defendants, upon which policies the complainants had been sued at law for their respective subscriptions; the object of the bill being to enable each complainant to establish a defence, which was common to all. And this decision was followed by Lord Abinger in the more recent case of *Mills and others* v. *Campbell* (2 Young & Coll. Exc. Rep. 389), where the suits against some of the complainants were upon ordinary policies by simple contract, and against others upon a policy under seal. This court also sustained a bill filed by different judgment creditors, having a common but not a joint interest in the relief sought by their suit, in the case of *Brinckerhoff and others* v. *Brown and others* (6 John. Ch. Rep. 139). And it is a common practice in this court for two or more judgment creditors, having separate judgments, to join in a suit to reach the equitable interests and choses in action of their com-

mon debtor, after they have exhausted their remedies at law, by executions upon their respective judgments.

The particular question which arises in this suit, whether two or more persons having separate and distinct tenements which are injured or rendered uninhabitable by a common nuisance, or which are rendered less valuable by a private nuisance which is a common injury to the respective tenements of each of the complainants, may join in a suit to restrain such nuisance, does not appear to have been raised in England until recently; and then in a single case only, which was not very fully considered. In the case of *Spencer & Ward* v. *The London and Birmingham Railway Company* (1 Nicoll, Hare & Car. Railway Cases, 159), which came before the vice chancellor of England in 1836, the bill was filed by the landlord and his tenant, for a nuisance which was supposed to be an injury to the interests of each in the property; and an injunction was granted without raising the question of misjoinder of parties.

The same thing occurred in the case of *Sutton and others* v. *Montfort* (4 Sim. Rep. 559), which came before the same equity judge five years previous; where two tenants of different buildings, having no joint interest, joined with the landlord of both in filing the bill to restrain the nuisance. But in the more recent case of *Hudson and others* v. *Maddison* (5 Lond. Jur. 1104), which came before him in December, 1841, where five different owners of separate houses had joined in a bill to restrain a nuisance which was a common injury to all their houses, he seems to have taken it for granted that the objection of misjoinder of complainants would be fatal at the hearing; and he discharged the injunction upon that ground alone. (See 12 Sim. Rep. 416, S. C.). Even if that case may be considered as finally settling the question in England, which I presume it does not, as it does not appear to have received the sanction of the lord chancellor, upon appeal or otherwise, I do not consider myself at liberty to follow that decision here; as the question was settled by this court directly the other way, more than twenty years since.

In the case of *Reed and others* v. *Gifford* (Hopk. Rep. 416), which came before Chancellor Sanford in February, 1825, the complainants, as the chancellor states in his opinion, were several proprietors of different lands and mills, and of separate parts of the natural water-course at the outlet of a lake. The nuisance

which they sought to restrain was an artificial channel, cut by the defendant upon his own land, the effect of which would be to draw off the water of the lake, and thereby to prevent it from flowing in its natural channel to the several mills of the complainants, respectively. And he decided that as the acts of the defendant, complained of, were a common injury to all the complainants, there was such a common interest in the subject of the suit as to authorize them to join in one bill; although the injury which each sustained, by the diversion of the water from his individual mill, was separate and distinct.

It is true each of the complainants, in that case, would have had the right to file a bill to restrain the nuisance, which was a special injury to his individual property. But as the relief sought was the same as to all the complainants, there certainly was no good reason for compelling them to file several bills to protect their common right against acts of the defendant, which were injurious to all of them. A similar opinion was expressed by me in the case of *The Trustees of Watertown* v. *Cowen* (4 Paige's Rep. 510); although from the manner in which the formal objection of the misjoinder of complainants was raised in that case, it was not necessary definitely to decide the question of misjoinder of parties. For it is well settled that a mere formal objection of that kind, which is neither raised by demurrer nor by the answer of the defendant, cannot be set up at the hearing as a bar to relief which is common to all the complainants.

In the case of *Marselis and others* v. *The Morris Canal Company* (Saxton's Rep. 31), where the objection was raised, that the bill was multifarious, because several persons having distinct and independent interests had joined therein as complainants, the acts of the defendants, complained of, were neither a joint nor even a *common injury* to all the complainants. There the entry upon the land of each complainant and excavating the same, for the purpose of making the canal, without compensating the owner for his property, was a distinct and independent cause of complaint. And it was in nowise injurious to his co-complainants; nor did it in any way interfere with, or affect, their several rights of property. That case therefore was rightly decided upon that ground. In the case under consideration, however, the bill shows that the erection and continuance of the alleged nuisance, and of

every part of it, is a common injury to the separate property and rights of each of the complainants.

It is said the complainants in this case in addition to their prayer for a perpetual injunction to restrain the continuance of the nuisance, have also prayed for an account, and compensation for the damage which they have respectively sustained by the alleged nuisance. The insertion of such a prayer might perhaps render the bill multifarious, if the court, at the hearing, would, upon the case made by the bill, be required to grant such multifarious relief, in addition to the restraining the continuance of the nuisance, which is a common injury to both complainants. But where multifarious relief is not prayed for in the bill, it is not a matter of course to give multifarious relief at the hearing, under the general prayer, in addition to the relief in which the complainants have a common interest. That objection to this bill may therefore be obviated by striking out that part of the prayer which calls for an account of the damages which the complainants respectively have sustained by reason of the alleged nuisance.

The motion to amend by striking out the name of Murray, as one of the complainants, must be denied with $15 costs. But the complainants are to be at liberty to amend their bill within twenty days, by striking out the prayer for an account and payment of the damages.

Lloyd v. *Loaring, 6 Ves. 773. (1802.)*

THIS bill, filed by Evan Lloyd and two other persons on behalf of themselves and all other members of the Caledonian Lodge of Free Masons, except the Defendant Loaring, against Loaring and another person, stated, that Plaintiffs are members or companions of a certain ancient fraternity, society, or lodge of Free Masons, called or known by the name of the Caledonian Chapter, No. 2, and being No. 2 on the list of the societies of Royal Arch Free Masons, consisting of Plaintiffs and a number of other persons; and Plaintiff Lloyd being the chief or principal officer, and the other two Plaintiffs secretaries or other officers of the said companion, chapter, or society: Plaintiffs as such three officers, as aforesaid, having the sole management and direction of the affairs of the said

Caledonian Chapter; which said chapter has been duly certified, and the names of the members registered according to law.

The bill farther stated, that the said chapter or society held their meetings at the Horn Tavern; and the dresses and decorations, and the books and papers, tools and implements, and other goods and effects, of the said chapter or society were there kept in a chest; the key of which was kept by Lloyd, as principal officer. A union with another chapter, called the Prudence Lodge, having been proposed and assented to by the members then present, and that the future meetings should be held at the Free Masons Tavern, the Defendant Loaring and four other members then present authorised the janitor or servant of the said chapter to remove the said property to the Free Masons Tavern; the master of which was directed to deliver it to him on producing the written order and in the presence of Lloyd, and to no other person. The Defendants afterwards went there; pretending authority from Lloyd; and that by mistake he had sent the wrong key; and they broke open the chest; and took away all the said dresses, &c.

The bill further stated, that by the rules and condition of the said society it is necessary, whenever any of the business or ceremonies are to be transacted or performed, that the Plaintiffs or one of them should be present; especially Lloyd as the president or principal officer; to whose care the key to the chest, and the effects, and the books, containing the laws and constitution and the accounts of the said society or chapter and the original warrant or charter are entrusted; and it is indispensable, that he should have possession of them; without which the society cannot properly be convened, or the business transacted; and the Defendant Loaring is interested in, or has a share in, the property vested in him as a joint tenant with the other members; and having got the exclusive possession of the said effects, is a trustee for the other members, and bound to restore them uninjured for the use of the society.

The bill charged, that the Plaintiffs took a Bow-street officer to the house of the other Defendant Hannam; who acknowledged, that they had taken the property; and restored part of it, that was in his possession; but that Loaring has the greatest part, and in particular the books of the constitution, laws, and rules, of the said chapter or society, the books of account, names of the members, minutes of the proceedings, and the original warrant or charter, granted to them by the grand or head chapter of Royal

Arch Masons; by which the Caledonian Chapter is constituted or authorised and continued, and without which original warrant or charter no meetings of the said chapter or society can be properly and regularly convened or held, or the business or ceremonies, or functions, of the said chapter or society performed; that the persons, by or from whom such constitution and warrant or charter were granted, are all long since dead; and no constitution or charter can now be had; and if the said constitution or charter or warrant should be lost or destroyed, the said chapter or society would either be wholly dissolved, and lose its rank and privileges among the several different lodges or chapters, or be prejudiced or degraded; that the Defendant Loaring has threatened and intends to burn or otherwise destroy the property, and in particular the books and the original warrant or charter; and that Plaintiffs are ignorant of the particulars, of which the property consists; and the Defendants refuse to discover, &c.; whereby the Plaintiffs cannot take any effectual steps at law.

The bill prayed a discovery; and that the Defendants may be decreed to deliver up the said articles uninjured or undefaced; and in the meantime be restrained from disposing of, burning, or otherwise destroying, defacing, or injuring, them.

The Defendants demurred generally to this bill for want of Equity, and also for want of parties.

Lord CHANCELLOR [ELDON]:

If this is not a corporation, how could these five persons remove these articles? Loaring himself had a right to object to the proposed junction. If I consider them as individuals, the majority had no right to bind the minority. One individual has as good a right to possess the property as any other: unless he can be affected by some agreement. But how is this Court to take notice of these persons as a society? A bill might be filed for a chattel; the Plaintiffs stating themselves to be jointly interested in it with several other persons: but it would be very dangerous to take notice of them as a society, having any thing of constitution in it. As to the Statute referred to, the meaning was only to take them, provided they gave notice of their meetings, out of the operation of the Sedition Laws, not to acknowledge them. In this bill there is a great affectation of a corporate character. They speak of their laws and constitutions, and the original charter, by which they

were constituted. In *Cullen* v. *The Duke of Queensberry,* Lord Thurlow said, he would convince the parties, that they had no laws and constitutions. But there was an allegation, that he was individually liable. It is the absolute duty of Courts of Justice not to permit persons, not incorporated, to affect to treat themselves as a corporation upon the Record. If the Plaintiffs had stated simply, that they and several persons were jointly interested, or even they on behalf of themselves and others, provided it was manifestly inconvenient to justice to make them all parties, and stating this case as individuals, upon the principle of *Fells* v. *Read* it might be very proper. That this Court will hold jurisdiction to have a chattel delivered up, I have no doubt: but I am alarmed at the notion, that these voluntary societies are to be permitted to state all their laws, forms, and constitutions, upon the Record, and then to tell the Court, they are individuals. Then what sort of a partnership is this; for it is now admitted to be a partnership? The bill states, that they subsist under a charter, granted by persons, who are now dead; and therefore, if this charter cannot be produced, the society is gone. Upon principles of policy the Courts of this country do not sit to determine upon charters granted by persons, who have not the prerogative to grant charters. I desire my ground to be understood distinctly. I do not think, the Court ought to permit persons, who can only sue as partners, to sue in a corporate character; and that is the effect of this bill.

The Demurrer was allowed.

May 13th. The Lord Chancellor, when the demurrer was allowed, having thrown out an intimation, that the Plaintiffs might amend, Mr. Romilly and Mr. Roupell moved for leave to amend the bill.

Mr. Piggott and Mr. Wooddeson, for the Defendants, opposed the motion; insisting, that it would not be permitted in the case of any partnership trade; that the decision in *Lord Coningsby* v. *Sir Joseph Jekyll* was not considered regular: at least it is not of course, where the demurrer is not merely for want of parties; and that there is not a passage in this bill, in which the objection taken by the Court does not occur.

Lord CHANCELLOR [ELDON]:

If the Plaintiffs strike out their present style as Plaintiffs, and sue as individuals, they will appear as different persons. I give

them leave to amend, because I am not sure, I should not contradict some rule; having had great doubt, whether I should allow the demurrer. That doubt is founded upon this; that it has been decided, that individuals forming a voluntary society may as individuals, not as a voluntary society, have such a joint interest in a chattel, that this Court would take notice of that interest, and of agreements upon it, not with reference to them as a voluntary society, but as individuals. I allude to the case I argued without success upon the tobacco-box. With respect to that decision I had considerable doubt, whether this very case would not arise out of it. I had great doubt, whether a voluntary association for the best purpose is to meet without the authority of a corporation, and make laws and statutes, which have no authority, and then call upon this Court to administer all the moral justice, that may arise upon the disputes among these, in a sense unauthorized, bodies. It is singular, that this Court should sit upon the concerns of an association, which in law has no existence; and in that case, that this Court should be ancillary to their agreements as to their toasts, &c. I was much disappointed with that case upon that part of it; though I never had a doubt as to the jurisdiction upon chattels between man and man. But it is too late to consider that now.

In this case, though I cannot disguise from myself, that the whole record attributed more of a corporate character than I ought to permit a voluntary society to put upon the record, yet I could not devest myself of this notion altogether; that, though they had assumed that character, yet upon the whole bill there was a case represented fairly of individuals with a joint interest, absurdly representing themselves corporate; and I had doubt enough therefore, whether over-ruling the demurrer was absolutely right. By giving leave to amend I thought I might enable them to reduce the record to that, which, it is admitted, might be made by a new bill. Suppose, Mr. Worsley's silver cup was taken away from the Middle Temple: the society must some way or other be permitted to sue; and this is really the same; for it is not material, what it is. Upon the whole therefore I thought it fair to let them amend by striking out all that.

In the manuscript notes I have seen strong passages, as falling from Lord Hardwicke, that, where a great many individuals are jointly interested, there are more cases than those, which are familiar, of creditors and legatees, where the Court will let a few

represent the whole. There is one case very familiar, in which the Court has allowed a very few to represent the whole world.

Leave was given to amend.

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1. WHERE a number of persons have an interest in the same subject, if a Court cannot recognize them as a legally associated body, but is bound to consider them as individuals, Lord Eldon declared, not only in the principal case, but in *Ex parte Lacey,* 6 Ves. 628, that the majority have no right to bind the minority.

2. As to the jurisdiction which Courts of Equity exercise, for the delivery of specific chattels, and the permission granted to certain individuals to sue, as representing a joint interest, although they may not be a regularly incorporated society, provided they do not profess, by their bill, to sue as corporators; see, *ante,* the note to *Fells* v. *Read,* 3 V. 70.

3. A plaintiff, it has been said, is now frequently permitted, as in the principal case, to amend his bill, in order to avoid the effect of a demurrer, at any stage of the argument, before judgment is given thereon (*Baker* v. *Mellish,* 11 Ves. 72); and, before the demurrer is argued, it was long ago agreed, that the plaintiff may obtain leave to amend his bill, as of course. *Lord Coningsby* v. *Sir Joseph Jekyll,* 2 P. Wms. 300. Convenience, and the saving of both expense and time, have dictated a farther relaxation of practice in modern days; strictly speaking, after a demurrer is allowed, the bill is out of Court; and Lord Hardwicke said there was no instance of permission given to amend it (*Smith* v. *Barnes,* 1 Dick. 67); but Lord Eldon has declared, that he knew many cases in which, after a demurrer allowed, and the bill dismissed by order, it had been considered in the discretion of the Court to set the cause on foot again. And, as this indulgence is granted to a plaintiff, so, on the other hand, when, during the pendency of the argument of the demurrer, and before judgment, the Court sees the demurrer is too general; but that, if more confined, it would be good; permission will, for the sake of justice, be given to the defendant to amend the demurrer, at that stage of the proceedings. *Baker* v. *Mellish, ubi supra.*

4. As to the cases in which the general rule, requiring all parties interested in a suit to be before the Court, may be dispensed with, see, *post,* the note to *The Attorney General* v. *Jackson,* 11 V. 365.

Monday Apr. 13. 18.

PARTIES DEFENDANT.

Hoyle v. *Moore, 4 Ired. Eq. (N. C.) 175. (1845.)*

Cause removed from the Court of Equity of Lincoln County, at the Spring Term, 1845.

The Bill is filed for the purpose of obtaining from the Court directions to the plaintiff, how to distribute property in his hands, which he holds as representing Alexander Moore, deceased. Alexander Moore, by his will, gave to his wife, Elizabeth Moore, considerable property, both real and personal, during her life, and, at her death, to be disposed of as she might think proper, among her children. Elizabeth Moore, by her will, gave a certain portion of the property, so devised to her, to the children of her deceased son, James Moore, naming them. The plaintiff is the administrator with the will annexed of Alexander Moore, and he may be the executor of Elizabeth Moore, though it is not stated in the Bill, nor is her will exhibited. The Bill then states, that, after selling a large portion of the personal property, preparatory to dividing it among those who were entitled, he was "by some of the legatees ordered to pay over none of the legacies or bequests, &c."; "that some of the negroes are *claimed* by Margaret Moore, relict and widow of James Moore, dec'd., who is the guardian of the children of A. Moore, dec'd. The other children claim that the negroes shall be sold and divided among the other children of Alexander Moore;" "that James Moore and William Moore, sons of A. Moore, died after the making of the will and before the testator. William left five children; and John Moore died many years before, leaving" — with a space, to insert, as we presume, the names of his children, but setting out none. The Bill then proceeds: "Robinson Moore is still living, Alexander is still living, John Rhinehardt married Ann, Michael married Polly, since dead; William Scott married Rosanna, both dead; they left issue William Scott, who died without issue, Alexander Rankin married Elizabeth, still living"—not stating the period when any of the foregoing died. The Bill then prays, that "the proper parties may be made defendants, and if there are others than those set forth, they may be made parties, &c."—"that the clerk may be ordered to issue his State's writ of subpœna to the proper defend-

ants, &c." Answers were filed by several persons, and replication taken, and the cause set for hearing.

NASH, J.:

We much regret it is not in our power to grant to the plaintiff the relief he seeks. The Bill, no doubt from haste, is so inartificially drawn, that we cannot give him the instructions required. It is a general rule in Equity, that all the persons, however numerous they may be, who are interested in the subject of a suit, must be made parties, either plaintiffs or defendants, if known; and like a declaration at common law, the circumstances constituting the case must be set forth in the Bill at large. Mr. Cooper, in his Equity Pleading, page 9, states, that the second part of the Bill sets forth the *names* of the parties. In order to obtain the answer upon oath, the Bill must pray, that the writ of subpœna issue to the defendant; and, although persons may be named in the Bill, none are parties to it, against whom process is not prayed. Coop. Eq. Plead. 16. 1 P. Wil. 593. 2 Dick. 707. A defendant is as necessary to the just and proper construction of a Bill in Equity as a plaintiff. In the case we are now considering, there is no defendant whatever—process is prayed against no one. The prayer is, "that the clerk be ordered to issue subpœnas to the proper defendants, &c." But who are they? No name or names are given. How is he to find them out? Is it to be left to his discretion to say, who ought to be made defendants? This, in fact, is what the plaintiff does ask. It is not, as before remarked, sufficient that the names of individuals are contained in the Bill. Process is not asked against them, nor against any one in particular. There is, then, *no party defendant* to the Bill. But the Bill is liable to other objections, equally fatal. It is, among other things, stated, that John Moore died before the testator, leaving children, and a blank is left in the Bill, after the word "leaving." apparently for inserting the names of his children, and perhaps of his representatives, if he had any. It is not stated whether there is a representative or not. The Bill does not state who are the children of Alexander Moore. The names of certain persons are mentioned, but whether they are such children, we are left to conjecture. Some of those, so mentioned, are said to be dead, but when they died we are not informed. It would be impossible

for the Court, upon this executor's bill, to know to whom to decree the money.

The Court has gone very far, in sustaining Bills defectively drawn—but we think this so essentially wanting in one of the points, necessary to the institution of a suit in any Court, that we cannot sustain it.

PER CURIAM. Bill dismissed.

MULTIFARIOUSNESS.

Warren v. *Warren, 56 Me. 360. (1868.)*

BILL IN EQUITY, heard on demurrer, brought in the name of George Warren and Lewis P. Warren, of Westbrook, who were the sole heirs at law of the late John Warren, against John G. Warren and Charles W. Scott, executors and trustees of the last will and testament of the late Nathaniel Warren.

The bill alleges substantially that, in 1815, John and Nathaniel Warren entered into a co-partnership in the business of lumbering, farming, trade and navigation, under the firm name of J. & N. Warren, each uniting his property, real and personal, and they were in all things to share equally in their partnership affairs; that their partnership business continued till Sept. 10, 1845, when John Warren died intestate, leaving the complainants his sole heirs and representatives, and that, upon his decease, all his property, together with his interests in said partnership business, vested in them; that, during John Warren's lifetime, he advanced to the partnership more than his proportionate part of the funds and performed more than his share of the services therein; that, at John Warren's decease, Nathaniel Warren had received the larger share of the partnership profits, and was indebted to John Warren therefor and for the surplus advances aforesaid; that the partnership thus continued without any adjustment, until Feb. 11, 1824, when Nathaniel Warren was found indebted to the co-partnership in a certain sum named; that, from Feb. 11, 1824, to the time of John Warren's death, there was no settlement or exhibit of the condition of the partnership affairs, although Nathaniel Warren kept the partnership books and papers and was thereto often requested by John Warren, and that no account thereof has been

rendered by Nathaniel Warren or his representatives, to the date of this bill; that, prior to the death of John Warren, the co-partnership acquired certain real estate, a part of which was thereafter divided, but a certain part thereof remained undivided at the decease of John Warren, which, together with a large amount of personal property, rights and credits, was continued in the partnership business; that no administration of John Warren's estate has ever been granted to any person; that the complainants became entitled to all the rights and remedies in equity to which their father in his lifetime was entitled.

The bill further alleges that, on August 11, 1844, one Walker united his business of lumbering to that of J. & N. Warren, and that the lumbering business was carried on by J. Warren, N. Warren and Walker, the said J. & N. Warren having one-fourth part interest each, and Walker one-half part interest therein; that, in all other respects, the partnership business of J. & N. Warren was conducted same as before Walker's connection therewith; that said lumbering business was carried on by the firm name of Warren & Walker, separate and distinct from the other partnership business; that, after the death of their father, the complainants succeeded to his partnership interests, all of which remained in the hands of Nathaniel Warren, and it vested in them; that, thus representing their father's interests, the complainants were admitted by Nathaniel Warren into the partnership before stated; that the co-partnership business, so far as the lumbering was concerned, was carried on by Nathaniel Warren, owning one-fourth, Walker one-half, and the complainants, owning and representing in the right of their deceased father, the remaining fourth part interest in the same; that the several parties in the lumbering business were each to contribute their respective proportion of services and property and receive a proportionate share of the profits; that the former partnership business of J. & N. Warren was continued after John Warren's death by Nathaniel Warren and the complainants, owning and representing the moiety of their father deceased, and they so continued in said business till Nov. 1862; that, after the decease of John Warren, Nathaniel Warren received more than his share of its proceeds and the complainants contributed more than their share to the business.

The bill further alleges that the lumbering business was continued by Nathaniel Warren, Walker and the complainants until

July, 1854, when Walker sold his interest to one Brigham, and received his share of the profits, and fully accounted for his share of the property; that, in July aforesaid, the complainants purchased Nathaniel Warren's interest in the lumbering interest; that Nathaniel Warren then held a large amount of property, rights and credits received from John Warren and never accounted for, and a large amount of interest and profits which arose from the funds of the co-partnership of J. & N. Warren, in the hands of N. Warren, before and after John Warren's death; that Nathaniel Warren, so holding the funds of J. Warren, in his lifetime, and, since his death, of the complainants, which he ought to have accounted for to the complainants, the complainants, at Nathaniel Warren's request, made their promissory note, dated July 1, 1854, and payable to Nathaniel Warren, for the sum of $8920; that said note was given for convenience, with the full understanding with Nathaniel Warren that whatever sum of money or other property Nathaniel Warren held as due John Warren in his lifetime, or, since his death, to the complainants, should be applied to the payment of said note, and that the amount so held was more than the value of the note.

The bill further alleges that the partnership business, other than the lumbering business, was continued by Nathaniel Warren and the complainants, till November, 1862, when Nathaniel Warren died testate, and the defendants were appointed executors of his will, duly probated, and trustees of certain trusts therein named, which they accepted; that, in Nov., 1866, the defendants, as executors, disregarding the understanding before named and contriving to oppress the complainants, sued said note and entered their action at the January term, 1867, of this Court, where the same is now pending.

The bill further alleges that, during the partnership of J. & N. Warren, both before and since the death of John Warren, Nathaniel Warren applied to his own use, from the profits of said co-partnership, large sums of money exceeding his proportion, and, up to the time of his death, Nathaniel Warren has had charge of the partnership books of account between himself and John Warren and between himself and the complainants; that the complainants have had no means to ascertain the true state of their accounts; that the complainants repeatedly applied to Nathaniel Warren in his lifetime, and, since his death, to the

defendants, for an account of all the affairs of the co-partnership between Nathaniel & John Warren, in his lifetime, and, since his death, between Nathaniel Warren and the complainants; that Nathaniel Warren, in his lifetime, refused and neglected to answer said account to John Warren or the complainants, as have the defendants since the death of Nathaniel Warren; that the defendants pretend that nothing is due the complainants; that Nathaniel Warren received $5000 more than his proportion of the partnership profits; that the defendants ought to apply said moneys to the payment of said note and be enjoined from prosecuting their suit thereon, and render a true account of the partnership transactions.

The prayer of the bill was for an answer and for an account of all the partnership dealings, and the defendants be decreed to apply whatever is found due the complainants to the payment of said note, and the balance to the complainants, offering to pay whatever may be found due from John Warren or the complainants; that, in the meantime, the defendants be restrained from prosecuting their suit on the note, and for further relief.

The defendants demurred, assigning the following causes:

1. That the claims and transactions set out in the bill occurred more than six years before the filing of the bill;

2. That the plaintiffs, as heirs of John Warren, have no right to maintain the bill or to any relief touching the same;

3. That, as to so much of the bill as seeks an answer touching real estate acquired by the co-partnership prior to the death of John Warren, the plaintiffs have not made such a case in reference thereto as entitles them to any discovery or relief;

4. That as to so much of the bill as seeks an answer touching the alleged admission of the plaintiffs into the co-partnership after the death of John Warren, the continuance of the co-partnership thereafterwards, &c., the plaintiffs have not made such a case as entitles them to any discovery or relief; and,

5. That the bill is exhibited for several separate and distinct claims and causes which have no relation to or dependance on each other, and concern different and distinct persons who have no common relation to or interest in the same; because the bill is multifarious, and because it discloses no equity on the part of the plaintiffs, nor any right to the assistance of a court of equity.

KENT, J.:

The principal ground, set forth in the demurrer to this bill, is that it is multifarious. Before examining the allegations in the bill, it is important to ascertain what is the true definition of multifariousness as applied to a bill in equity, and its extent and limitations. Equity, whilst it is broad and liberal in the application of remedies, and avoids the strict technicalities of the common law, yet forbids the mixing together in one bill of entirely distinct and independent matters of complaint, or the introduction of parties who are not interested in the subject matter or decree sought, and have but an incidental interest in some question raised by the statements in the bill. The objection, therefore, is of a two fold character, one relating to the subject matter and prayer of the bill, and the other relating to the parties thereto. But "a bill is not multifarious because it joins two good causes of complaint, growing out of the same transaction, when all the defendants are interested in the same claim of right, and when the relief asked for in relation to each is of the same general character." *Foss* v. *Haynes,* 31 Maine, 81; Story's Eq. Pl., § 284.

Where the object of the bill is single, to establish and obtain relief for one claim, in which all the defendants may be interested, it is not multifarious. *Bugbee* v. *Sargent,* 23 Maine, 269. "A bill is not to be regarded as multifarious when it states a right to account from A & B against whom it has one remedy which it seeks to enforce, and also claims a lien against A for what is due." Story's Eq. Pl., § 284.

A bill is not multifarious when it sets up one substantial ground of relief and also another on which no relief can be had. *Varrick* v. *Smith,* 5 Paige, 137.

In the case of *Newland* v. *Rogers,* 3 Barb. C. R., 432, Chancellor Walworth, after stating that there did not appear to be any necessary connection between the different subject matters stated in the bill, says that, "the counsel is wrong in supposing that two distinct and independent matters or claims, by the same complainant against the same defendant, cannot properly be united in the same bill. Multifariousness in a bill is only where different matters, having no connection with each other, are joined in the bill against several defendants, having no interest in or connection with one or more of the distinct causes of action or claims for which the bill is brought, so that such defendants are put to the

unnecessary trouble and expense of answering and litigating matters stated in the bill in which they are not interested, and with which they have no connection. But a simple misjoinder of different causes of complaint, between the same parties, which cannot conveniently and properly be litigated together, is sometimes called multifariousness, although the ground of objection, in such cases, depends upon an entirely different principle, and is a mere matter of convenience in the administration of justice."

Story also says,—that "the objection of multifariousness and the circumstances under which it will be allowed to prevail, or not, is, in many cases, a matter of discretion and no general rule can be laid down on the subject." Eq. Plead., § 284.

The Supreme Court of the United States takes the same view in *Gaines* v. *Chew,* 2 How., 619, and in *Oliver* v. *Platt,* 3 How., 411. In the latter case, the Court say,—"We are of opinion that the bill is in no just sense multifarious. It is true that it embraces the claims of both companies, but these interests are so mixed up in all these transactions that entire justice could scarcely be done, at least, not conveniently be done, without a union of the proprietors of both companies. It was well observed, by Lord Coltenham, in *Campbell* v. *McKay,* 1 Mylne & Craig, 603, and the same doctrine was affirmed in this Court, in *Gaines* v. *Chew,* 2 Howard, 642, that it is impracticable to lay down any rule as to what constitutes multifariousness as an abstract proposition; that each case must depend upon its own circumstances, and much must necessarily be left, where the authorities leave it, to the sound discretion of the Court."

If we apply the doctrines and principles of these authorities to the facts in this case, we fail to find sufficient foundation to the objections made, to require us to dismiss the bill on the ground of multifariousness.

The case presented in the bill is substantially one between partners, seeking for an adjustment of partnership business. It sets forth a co-partnership as existing between the complainants and the deceased, represented by the defendants, from 1845 to 1862.

That such a partnership existed during that time, is distinctly averred. The bill in fact seeks for an adjustment of that partnership, and the ascertainment of the rights of the different parties during the existence of that firm. It is true that it sets forth the existence of a co-partnership between John and Nathaniel Warren

for many years before 1845, and that the complainants are the heirs of John. If the bill had been framed as claiming a right as heirs alone to have an adjustment of the partnership, without showing any other connection with the co-partnership, than as heirs of their father, it might well be questioned whether such a bill should not be instituted by an administrator and not by the heirs. But the bill sets forth that the complainants, being heirs, "were admitted by Nathaniel into the partnership before stated." They then became co-partners, and not simply heirs, and came in as members of the firm, as individuals, and not in their representative capacity. They now ask that the old co-partnership matters may be examined, not on the ground that they were members of the firm before their father's death, but because they were so intimately connected with the business after his death, that it is necessary to investigate and settle these prior matters, in order to determine the rights of the parties under the firm as it existed after the complainants came in.

If they came in, assuming simply their father's place by consent or understanding with the surviving partner, and entitled to all his interest in the firm property, and liable for all its debts, then it may be that they should be held entitled or liable, as the case might be, from the settlement in 1824. In such a case, if it became necessary to institute a bill in equity to adjust the affairs of the firm, thus continued, it clearly would not be multifarious to connect the prior with the subsequent transactions and seek for an adjustment of both, where the parties are the same.

If another view is taken and these complainants are to be regarded as having been admitted as members of a new firm, and independent of the old one, but as contributing the capital belonging to their father at his death, in the firm, it would not be objectionable to ask for an examination and adjustment of the condition of that firm, in order to ascertain, among other things, what capital was in fact put in by the new partners. At all events, the transactions referred to in the bill are not so entirely disconnected with the main purpose of the suit, as to justify us in saying that they cannot have any bearing on the case after all the facts are developed.

The allegations in the bill in reference to the branch partnership, in which one Walker was originally a party, do not appear to us as improper, or as such distinct and independent and un-

connected matters as bring them within the objection of multifariousness. That partnership was in relation to one branch only of the business of the general firm, and was confined to that particular business. It was well likened by the counsel for the complainants to the branches of a co-partnership, so common in mercantile transactions, existing in different cities or countries. It is not properly a distinct and independent firm, but a wheel within a wheel, or a branch from a common trunk.

If Walker had remained as a partner, he, undoubtedly, should have been made a party. But the bill shows that, in 1854, Walker sold out his interest, and received from the partnership his share of the profits, and fully accounted for his share of the property. On the same day, the complainants purchased of Nathaniel Warren, the testator, his interest in the lumbering business, which was the sole business of the branch firm. Thus that particular union was dissolved, and Walker had no further interest, and no claim is made upon him, nor any that could affect his interests.

How far the purchase by the complainants of Nathaniel Warren's interest was a full and final settlement, so far as that branch of the business is concerned, we cannot determine until the whole case is developed by the proof. All we now say is, that the bill is not objectionable for this cause on demurrer. The same remark may apply to the statute of limitations, invoked as one cause of demurrer. The bill was commenced within six years after the final dissolution of the partnership, by the death of Nathaniel Warren, in 1862.

We are now called upon to consider, on this demurrer, whether or not the statute of limitations should be applied to any part of the transactions between the parties, or whether they were in the nature of merchants' accounts, or open transactions, the investigation of which would not be precluded by the statute. These questions may well await the answers and proof. There is nothing in the bill which on its face shows that the cause of complaint is necessarily and absolutely barred by the statute of limitations.

Demurrer overruled.

BARROWS, DICKERSON, DANFORTH and TAPLEY, JJ., concurred.

Winslow v. *Jenness, 64 Mich. 84. (1887.)*

Appeal from Lapeer. (Stickney, J.) Argued October 28, 1886. Decided January 6, 1887.

Bill to restrain the prosecution of 21 ejectment suits. Demurrer, for multifariousness in the misjoinder of unconnected causes of action, sustained, and bill dismissed. Affirmed. The facts are stated in the opinion.

CAMPBELL, C. J.:

This bill, which was filed in February, 1886, seeks to restrain defendant Gertrude Smith from prosecuting 21 ejectment suits, and to compel her to convey to the several complainants an undivided third interest each to the property involved in the suit in which he or she is interested. There are no joint interests in complainants. Each claims title to separate land, in which Mrs. Smith sets up her own title to an undivided third. Defendant Gertrude Smith demurred for multifariousness in the misjoinder of unconnected causes of action, and the demurrer was sustained, and the bill dismissed. Complainants appeal.

The case contains a recital of several matters, giving the history of various partnership matters, which are detailed in a bill formerly filed by defendant Isaac N. Jenness against his co-defendant, Gertrude Smith, to obtain the same relief which is sought here. *Jenness* v. *Smith,* 58 Mich. 280. The present record does not entirely conform to that. But in order to try the sufficiency of the present bill on the one question of multifariousness, it will only be necessary to give an outline of the controversy, giving complainants the advantage of all the ambiguities.

The case, thus abridged, is this: Henry Fish, father of Gertrude Smith, died intestate in May, 1876, leaving her his heir at law, 17 years of age. Before his death, he, and defendant Isaac N. Jenness, and Allen Fish (since deceased) were owners of considerable tracts of land in Michigan, including the lands here in controversy, which are in Lapeer county. They were all in partnership, under the name of I. N. Jenness & Co., and these lands, although held by tenancy in common, are claimed to have been partnership property. After Henry Fish's death, it is claimed it became necessary to continue the business and manufacture the pine left, so as to close matters out, and, after using such personal

assets as could be spared without stopping the business, the debts could not be paid off without selling lands.

Allen Fish became defendant Gertrude's guardian, and, supposing sales could not be made complete without authority to act for her, applied to the circuit court for the county of St. Clair, and obtained a decree, the substance of which is not set out, but which, it was assumed, gave him power to act for her. Had the case been otherwise sufficient, it would have been necessary to show just what those proceedings were. After that decree, Allen Fish, for himself and also as guardian, joined in warranty deeds with Isaac N. Jenness and the widow of Henry Fish, to several parties, of the various parcels of land involved in this suit, including the complainants or their respective grantors, for prices set forth in the bill; and the consideration so received was used for partnership purposes. These conveyances were not made at auction or at the same time, but at private sale, and from time to time, during the year 1877. It does not appear when the contracts were made, and it is not averred that the deeds referred to the lands as partnership property, or that they were so considered by the purchasers. All that is shown as to the partnership is that the money was used for its benefit. One of the conveyances is shown to have been made in carrying out an individual land contract executed by the three partners during Henry Fish's life-time. This piece of land is averred to have been conveyed for a valuable consideration, the amount of which does not appear, by Allen Fish, for himself and as guardian, with Mrs. Fish, to Jenness, who conveyed the land to Charles Bashaw, a complainant, and holder of the original contract.

It is assumed, and is no doubt true, that Fish's deeds as guardian were void, the sales never having been reported or confirmed. Whether any lands remained unsold does not appear, but is not important now.

Gertrude Smith has brought ejectment for her interest as heir at law, each complainant being sued separately for his or her several parcels.

The case, then, is that of a person claiming an undivided interest, which, so far as she is concerned, has never been parted with, who is sued in equity to compel her to surrender and release it to the several grantees of her co-tenants, on the assumption that they owned it all and conveyed it all equitably.

The guardian's transfers are not relied upon, and could not be relied upon, as having any part in the controversy. No equity could arise out of them. They were nullities, or else the bill had no basis.

The legal issue is, therefore, a simple one. Each of these complainants claims under a purchase which was not made under any legal proceedings, which was separate in time and in consideration from every other sale. The only alleged common equity is that the conveyances from Jenness and Allen Fish, which in law conveyed two-thirds, should be held in equity as conveying the entirety.

The bill does not even show a simultaneous origin, or a common fraud or contrivance by which these complainants were deceived. All that can be made out is that they bought of the same parties independently, and their title has failed in the same way; and no fraud or conduct of defendant in any way contributed to their difficulty.

This attempt to obtain relief by joint bill goes beyond the broadest doctrine which has been formulated anywhere. There is no common wrong and no privity among them. Their grievances are similar, and that is all that can be said in their favor.

The general rule of equity is that every several grievance must be redressed by a several proceeding. The only recognized exceptions to it (and these are considerably qualified) are instances where there is a single right asserted on one side which affects all the parties on the other side in the same way, or a single wrong which falls on them all simultaneously and together. The instances which are most familiar are rights in common which are resisted by the owner of the estate on which it is charged, tax-rolls assessing all parties on an equal ratio, frauds by trustees affecting all the *cestuis que trustent,* and the like. Here the grievances are not separate and similar, but single and uniformly injurious. And it has been held in this Court, as well as elsewhere, that, if there is any distinction in the proportion or character of the several grievances, there can be no joinder. *Kerr* v. *Lansing,* 17 Mich. 34.

Where the cause of grievance does not arise out of the same wrong, affecting all at once as well as similarly, there is no foundation for any such joinder. Our own precedents have settled the doctrine sufficiently.

In the case of *Walsh* v. *Varney,* 38 Mich. 73, each of several

complainants had purchased separate parcels under partition proceedings, which were valid as against all who were before the court, but which left out some of the tenants in common. These complainants joined in a bill to restrain ejectment suits brought by the heirs not concluded by the partition, and sought further to have the partition decree opened and extended so as to bind them. But it was held complainants had no common grievance entitling them to join, and also that they had no rights beyond their purchase. This last point bears on another difficulty in this case which is distinct from the question of multifariousness. As the bill states their case, they bought a title in which defendant purported to have an interest in her own right, and which failed apparently from a defect in the guardian's power, of which, as that decision holds, they had notice.[1] The bill does not indicate that they bought in reliance on the right of Fish and Jenness to convey the whole.

In *Bigelow* v. *Booth,* 39 Mich. 622, a bill was filed by complainants to redeem, basing their right on a joint interest acquired under execution. It was held that, as this joint title failed, the bill could not stand to help separate interests derived otherwise. That case, however, is not one where the particular point raised here is very clearly presented, although a bill to redeem usually includes all parties to be affected.

In *Woodruff* v. *Young,* 43 Mich. 548, a bill filed against three defendants for fraud in hindering complainant from getting the settlement of an estate in which they were all concerned, and also for frauds committed by them separately in various dealings arising out of the same family relationship, but not connected with the estate, was held multifarious, because the frauds were distinct.

In *Brunner* v. *Bay City,* 46 Mich. 236, it was held that parties whose lots had been sold under the same illegal assessment, and bid in by the city, had no longer any grievance for which they could join in a bill, and that each lot-owner had merely the several right to pursue the city as he would any other person having a deed which would be a cloud on his title to the separate lot. That case cannot be distinguished in principle from this. And this was on the ground that thenceforward any claim or assertion by the city against one lot could in no way affect any other lot, but must be prosecuted and defended separately. It cannot help or hinder any

[1] "It is a well-settled doctrine that parties purchasing titles under judicial sales purchase just what can be lawfully sold, neither more nor less, and have no further rights. *Walsh* v. *Varney,* 38 Mich. 76.

one of these complainants to have defendant's title made out or defeated against any of the rest. Judgment in one of the ejectment suits could not be shown in any of the others, and could not affect them.

It is hardly necessary to increase citations, but they are not difficult to find. In *Jones* v. *Garcia del Rio,* 1 Turn. & R. 297, where several persons had been induced to buy scrip in the same loan by a fraud affecting them all in the same way, but by separate purchases, Lord Eldon dismissed their bill on this sole ground. He said that the plaintiffs, if they had any demand at all, had each a demand at law, and each a several demand in equity; that they could not file a bill on behalf of themselves and the other holders of scrip; and, as they were unable to do that, they could not, having three distinct demands, file one bill; and, upon that ground alone, his lordship, without again adverting to the question of public policy (which had been raised and discussed), dissolved the injunction. This decision was in 1823.

In 1834 the United States Supreme Court decided the case of *Yeaton* v. *Lenox,* 8 Pet. 123, on the same principle. There a considerable number of underwriters, taking risks on the same property and voyage, but severally, and not jointly, had paid their insurances to the same bank as holder, on the understanding that the money should be refunded if it turned out they were not liable. This having been ascertained, they joined in a bill against the trustees of the bank, which was in liquidation, its charter having expired, to recover back their funds. Chief Justice Marshall disposed of their claim very briefly, refusing to pass on the equities, which were controverted. He said:

"The plaintiffs who unite in this suit claim the return of money paid by them severally on distinct promissory notes. They are several contracts, having no connection with each other. These parties cannot, we think, join their claims in the same bill."

The principle is also recognized in Story, Eq. Pl. § 279, and Daniell, Ch. Pr. 395.

It is by no means clear from the allegations in the bill that the grievances or claims of these complainants are entirely similar in their equities. But this we do not think it necessary to discuss. Their claims, good or bad, are entirely separate, and there is no common grievance.

The decree should be affirmed, with costs.

The other Justices concurred.

Pointon v. *Pointon, L. R. 12 Eq. Cas. 547. (1871.)*

DEMURRER for multifariousness and for want of parties.

George Pointon, who died on the 6th of January, 1863, leaving a widow, the Defendant Eliza Pointon, and four children, three of whom were Plaintiffs, the fourth being out of the jurisdiction, and not a party to the suit, him surviving, and who at the time of his decease was carrying on, in partnership with his brother, the Defendant William Pointon, the businesses of lime burner and corn merchant and miller, by will, dated the 2nd of January, 1863, after bequeathing all his furniture to his wife, subject to the payment of certain debts, gave, devised, and bequeathed all his property, real and personal, unto his wife and to his brother William Pointon, whom he appointed executors, upon trust to convert into money by sale, or by William Pointon taking all or any part thereof by valuation, which he thereby empowered him to do, and to invest (as in the will mentioned) for the benefit of his wife for life, and after her decease or second marriage to divide the same equally amongst all his children. The bill, filed on the 16th of May, 1871, against William Pointon and the testator's widow, alleged that the testator's estate included his share and interest in the assets of the partnership; that the affairs of the partnership had not been wound up; that William Pointon, on the death of the testator, possessed himself of such assets; that he had carried and was carrying on the businesses under the old style; that it was expedient that the testator's estate should be administered by the Court; also that the accounts of the partnership should be taken; that this could not be conveniently done, except in this suit or in one similarly constituted, William Pointon being both executor and suriving partner; that William Pointon ought to account for what he had received, and for what, but for his wilful default and neglect, he might have received on account of the testator's estate; that he had employed the testator's estate in the businesses, and had thereby occasioned great loss to it; that he had mismanaged and neglected the businesses, and that thereby large sums had been lost to the testator's estate. There were also allegations that he was getting in the outstanding partnership debts, and that he intended to apply them to his own use; that he had

agreed to purchase Forge Mill and the stock-in-trade, part of the partnership assets, at a valuation, and had obtained a conveyance of the mill, but had not paid the purchase-money either in respect of the mill or in respect of the stock-in-trade, and that he had advertised the mill for sale by auction.

The Plaintiffs, three children of the testator, prayed that his estate might be administered; for accounts of what William Pointon had received, or, but for his wilful default and neglect, might have received; and that he might be charged with what was due from him in respect of the partnership, both before and since the death of the testator, and with all losses occasioned by his mismanagement and neglect in reference to the businesses; for a receiver of the testator's estate and of the assets of the partnership and of the businesses carried on by William Pointon since the death of the testator; and for injunctions to restrain William Pointon from interfering with the testator's estate and the assets of the partnership before and since his death, and from selling the mill; and for the appointment of new trustees; and for all proper accounts.

SIR JOHN WICKENS, V. C.:

I think that the demurrer to this bill is not well founded. It is a demurrer for want of parties, and for what is called multifariousness, but which is really misjoinder of subjects in a suit. As to the objection for want of parties, the case appears to me to be clearly within the 9th rule of s. 42 of the 15 & 16 Vict. c. 86, and I think it is impossible to hold that three out of four *cestuis que trust*—residuary legatees—cannot sue an executor, because the fourth has not been brought before the Court, without doing away with the operation of this clause of the section. The only authority which has been relied upon on this point is the case of *Payne* v. *Parker*. That is a case of this sort: A trustee under a settlement was brought before the Court to represent the interests of the *cestuis que trust*, and the Plaintiff, having elected to have those interests represented, was bound to have them represented by proper persons. The only question was, whether he had done so; and the Court decided that the trustee, Mr. Heningham, did not sufficiently represent the interests of the *cestuis que trust*, and required that they should be made parties; and I think that the Court could not have decided otherwise. But that case, when

attentively looked at, has, in my opinion, no application to the present.

Next, as to the question of multifariousness: I think that there is no more in the objection on that ground than there is in that for want of parties. There are three analogous vices to which bills in equity are subject—misjoinder of Plaintiffs, misjoinder of Defendants, and multifariousness or misjoinder of subjects of suit. It is the last which is imputed to this bill. Multifariousness, properly so called, exists when one of the Defendants is not interested in the whole of the relief sought, as the old form of the demurrer for multifariousness shows. Misjoinder of subjects of suit is where two subjects distinct in their nature are united in one bill, and for convenience sake the Court requires them to be put in two separate records. The case of *Salvidge* v. *Hyde*, 5 Madd. 138; Jac. 151, in which the bill was for the administration of a testator's estate, and to set aside a sale made of part of it by the executor, was an instance of this. There the Court refused to allow the two subjects to be united, although the Plaintiff was interested in each, and the Defendants were liable in respect of each. In the present case the misjoinder is of this nature: the suit is first an ordinary suit against the devisees in trust and executors for the administration of the real and personal estates of the testator; and, secondly, the Plaintiffs claim to have the partnership accounts taken as between the testator's estate and the Defendant William Pointon, the testator's partner and one of the executors and trustees; and then the suit is further complicated in this way: it is alleged that William Pointon has sold to himself or taken possession of the partnership assets at a valuation under a power in the will, and that he has not paid for them. It is suggested that not only is the price of such assets in his hands, but that he having sold to himself without payment, what was purported to be sold remains assets of the testator till the price is paid. If a trustee who is entitled to take property at a valuation has a valuation made, but does not pay the money, nothing passes; until the money has been paid he has no interest in the property.

It is not necessary to consider whether the Plaintiffs are or are not entitled to all the relief which they ask; but the question is, whether the various subjects as to which relief is sought are such as if fit for discussion can be properly dealt with in one suit. This is, of course, a matter of discretion. The Court will not allow

distinct subjects to be mixed up in one suit when it would be inconvenient to the Court, or unfair to some one or more of the parties to it; but not one of these considerations, or of those mentioned in the case of *Campbell* v. *Mackay,* 1 My. & Cr. 603, applies to the present case. The estate of the testator cannot be wound up until the partnership accounts have been taken, nor until it has been ascertained whether William Pointon will pay the purchase-money or not. It is quite clear that, if there are to be separate suits, they must be closely intermixed, and the winding-up of the principal suit must await that of the other or others, and before it can be found out what the estate of the testator consists of, or what William Pointon owes to it, the partnership accounts must be taken. I am wholly unable to discover why they should not be taken in this suit. If it would result in inconvenience or unfairness, it would be another matter; but it appears to me to be impossible to say that any inconvenience can be apprehended, or that any injustice will be done. My opinion being that the objection as to misjoinder of subjects has failed as completely as that as to misjoinder of parties, the demurrer must be overruled.

CHAPTER III.

FORM AND REQUISITES OF A BILL IN EQUITY.

Parts of a Bill in Equity.

Comstock v. *Herron*, 45 Fed. Rep. 660. (1891.)

Sage, J.:

This cause is before the court upon exceptions to the answer of the respondents Herron and Fisher. The bill charges that as executors and trustees under the will of Margaret Poor, deceased, they have delayed, neglected, and refused, and still delay, neglect, and refuse, to invest the sum of $56,667, as directed by the will, in productive real estate and mortgages or interest-bearing stocks and bonds, and to pay the income therefrom to the complainant. The respondents answer, denying the averments, and stating that they have never been requested until the present year, by the complainant or any other persons, to make said investments, and that, on the contrary, it was well known to the complainant that they were proceeding as rapidly as possible to convert the estate into money or productive property, so as to make said investments; also that their entire conduct in this matter was fully known to the complainant, and approved by her, and that she has never expressed the least dissatisfaction in reference thereto. To these averments the complainant excepts. They are directly and properly responsive to the charge of the bill. I do not think that the respondents, when charged with dereliction of duty and violation of their trust, ought to be limited to a simple denial, and to be precluded from setting up that not only was no objection made by the complainant, but that she approved their entire conduct in this matter. While it may be true that that may not affect the final decree in this case, I think the trustees are entitled to relieve themselves from the imputations which are at least implied by the averments of the bill. Moreover, these averments of the answer are directly responsive to the charge that the respondents refused to make investments. The same line of remark applies to the portions of the answer in which the respondents state that they

were assisted by the complainant in their efforts to sell the Newport cottage; she being familiar with it, and owning the furniture in it. Without entering into detail, it is enough to say generally that the bill charges the trustees with neglecting their duties and refusing to carry out the provisions of the will, and that by their failure to execute the trusts reposed in them the estate is constantly being depleted, and that there is danger of the destruction of the distributive share of the complainant, and, further, that they have mingled the trust moneys of the estate coming into their hands as trustees and executors with their own money and property, instead of keeping the same separate and apart, by reason whereof the money and property of the estate is likely to be confused, so that it cannot be separated from other funds. The averments of the answer to which exceptions are taken are in response to these wholesale charges, with reference to which the respondents have a right to vindicate themselves. It was said, in substance, upon the argument that there was no intention to reflect upon the respondents, and that the bill was drawn in accordance with approved forms, and it was insisted that the averments of the answer excepted to did not touch the merits of the cause, which was not intended to be adversary, but merely for the construction of the will and the ascertainment of the rights of the complainant. Nevertheless the averments are in the bill, and, being there, the respondents have a right to answer them fully. Originally a bill in equity consisted of nine parts, of which there were five principal parts, to-wit, the statement, the charges, the interrogatories, the prayer of relief, and the prayer of process. But all these, according to more recent authorities, may be dispensed with excepting the stating part and the prayer for relief; for, as Langdell in his hand-book on Equity Pleadings states:

"All that was ever essential to a bill was a proper statement of the facts which the plaintiff intended to prove, a specification of the relief which he claimed, and an indication of the legal grounds of such relief." Section 55.

Had the bill been confined to these limits, as it might have been, there would have been no occasion for the answers to which the exceptions are directed; but, as it was not so limited, and as the answers do not go beyond what is responsive to the bill, the exceptions will be overruled, without taking into consideration whether the matters set forth in the portions of the answer to which the

exceptions are taken are material to the final disposition of the cause.

ADDRESS OF THE BILL.

Sterrick v. *Pugsley, Fed. Cases, No. 13379. (1874.)*

On motion of complainant [Charles V. Sterrick] for a preliminary injunction to restrain defendants [James W. Pugsley and others] from using a deed of assignment of a patent by complainant to defendant Pugsley, and from claiming or exercising any rights thereunder.

LONGYEAR, District Judge:

Some preliminary objections will be first noticed. The defendants' counsel objected to the bill of complaint being read on the grounds: 1st—That the entitling of the court is not "in equity," but of the "circuit court," etc., merely. 2d—That it is entitled in the cause.

The address of the bill is to the "circuit court," etc., "in chancery sitting." This is sufficient, and if the entitling of the court were of any consequence the court would direct it to be amended by adding the words "in equity." The bill is entitled in the cause. This is irregular, because until the bill is filed there is no cause pending. The bill, however, is complete without it, and the entitling as to the parties is rejected as surplusage. The objections to the bill are, therefore, overruled.

Counsel for defendants also objected to the reception and reading of the affidavits annexed to the bill of complaint in support of the motion for injunction on the grounds: 1st—That they have no proper venue. 2d—That they are not entitled in any cause "in equity."

The affidavits are sworn to before United States circuit court commissioners, some of them before a commissioner for the Eastern district, and some before a commissioner for the Western district of Michigan. The venue of each is: "State of Michigan, County of Calhoun," or, "County of Kalamazoo," according, I suppose, to the county in which the oath happened to be administered. This was irregular. The proper venue of an affidavit taken before a United States commissioner is: "United States of America, Dis-

trict of ———," naming the district and state for which the commissioner is such. In this case it should have been "Eastern District of Michigan," or "Western District of Michigan," as the case was. In the view taken by the court, however, upon the merits of the motion, admitting all the affidavits, it is unnecessary for the purposes of this case to decide what is the effect of the irregularity in the venue.

The objection to the entitling of the court is not tenable upon the ground stated. The affidavits were all made before the suit was commenced. Such affidavits should in no case be entitled in any court or cause. When they are so entitled it is a good cause for their rejection. *Reg.* v. *Jones,* 1 Strange, 704; *Rex* v. *Pierson,* Andrews, 313; *Rex* v. *Harrison,* 6 Term R. 60; *King* v. *Cole,* Id. 640; 1 Daniell, Ch. Prac. 891; *Humphrey* v. *Cande,* 2 Cow. 509; *Haight* v. *Turner,* 2 Johns. 371; *In re Bronson,* 12 Johns. 460; *Milliken* v. *Selye,* 3 Denio, 54; *Hawley* v. *Donnelly,* 8 Paige, 415; 1 Barb. Ch. Prac. 600. See, also, the decision of this court made in the present term in *Blake Crusher Co.* v. *Ward* (Case No. 1505). But it was said at the argument, if there is no entitling how can it be known for what purpose the affidavit was made? This objection, if it be one, can be very easily obviated by stating the purpose for which it is intended in the affidavit itself.

The bill and affidavits having been read, defendants' counsel offered to read a sworn answer and accompanying affidavits in opposition to the motion. To this the complainant's counsel objected, on the ground that he had not been served with copies. Affidavits to be used in support of, or in opposition to, special motions, ought always to be served on the opposite counsel a reasonable time before the motion is brought on. Where this is not done the court may reject the affidavits, or, in its discretion, allow the same to be read, giving the opposite party the option to proceed with the hearing or to take time for the perusal and examination of the affidavits, and production of affidavits in reply, where that is competent. The latter course was pursued in the present case.

INTRODUCTION.

Gove v. *Pettis, 4 Sandf. (N. Y.) 404. (1846.)*

DEMURRER by the defendant, Pettis, to a bill filed against him, together with W. Austin and B. Dyckman. Several causes of demurrer were expressed, and at the hearing, other objections to the bill were taken, *ore tenus;* all of which will be found stated in the opinion of the court.

THE VICE-CHANCELLOR:

It is no longer a ground of demurrer that the complainant omits to state in the bill, his occupation or addition.

The omission of the signature of solicitor or counsel is a cause for moving to take the bill from the files of the court. It is a matter of practice, not of pleading; and is not a proper subject for a demurrer.

I think otherwise of the omission to verify the bill, or to waive an answer on oath. The bill as served, is one not verified by the oath of the complainant, and yet it requires an answer on the oath of the defendant. By the 17th rule, if the bill do not waive the defendant's oath to the answer, it *must be* verified by the complainant or his agent, attorney or solicitor.

This is a substantial part of the pleading, having a vital influence on the cause; and the omission to comply with the positive requirement of the standing rule, is a defect in the bill for which a demurrer may be interposed. The chancellor has so decided in respect of the averments in creditor's bills, prescribed by the 189th rule. *(McElwain* v. *Willis,* 3 Paige, 505.)

As this defect is obviously a slip or clerical error, which might be amended, I have looked into the demurrer for want of equity, which was raised *ore tenus,* at the hearing. No relief is prayed against Pettis, nor is it stated that the discovery from him is essential or material. It does not appear by the bill, that Abbott has not a perfect remedy at law. The facts stated are available at the trial in his defence, and there is no apparent reason for his coming into this court.

On these grounds the bill must be dismissed as to Pettis, but without costs. It is dismissed finally, on the demurrer *ore tenus,*

which, if it were the only valid one, would be allowed upon the payment of costs. On the other hand the demurrer for form, being well taken, would, standing alone, entitle the defendant to a bill of costs on the complainant's amending. It will be equitable, therefore, to give no costs to either party.

Harvey v. *Richmond, 64 Fed. Rep. 19. (1894.)*

On Two Demurrers to the Bill of Complaint.

HUGHES, District Judge:

This case is before me at present solely on the pleadings filed. The bill was first presented to one of the judges of the court on a motion for an injunction and the appointment of a receiver. After a hearing on this motion and two other hearings of motions by the court, the bill went back to rules. Under the practice obtaining in the circuit courts of the United States, it became incumbent upon the defendants in the cause to plead at the September rules last past; that is to say, on Monday, the 3d of September. It so happened that that day was a national holiday, and dies non, the clerk's office being closed. This circumstance constituted Tuesday, the 4th of September, which was the next succeeding day, the September rule day for the purposes of this case. Accordingly one of the defendants, viz., the Richmond Railway & Electric Company, appeared and filed a demurrer to the bill on the 4th. Afterwards, to wit, on the 6th of September, the Richmond & Manchester Railway Company entered its appearance by counsel, and tendered a demurrer, on its part, to the bill of complaint.

The two demurrers are substantially the same. The disposal of one of them by the court will virtually dispose of the other. As the demurrer of the Richmond defendant is regularly in, and permission to file that of the Manchester defendant cannot materially affect the proceedings in the case, and as, moreover, it is within the discretion of the court to permit the filing of the demurrer of the Manchester defendant, the court permits that demurrer to be filed.

The principal ground of demurrer insisted upon by defendants is the failure of the bill to set out the places of residence of the

plaintiffs in the cause, and also the places of residence of defendants. The bill alleges the plaintiffs to be citizens of Maryland, and the defendants to be citizens of Virginia, but disregards rule 20 in equity which requires the residence of all parties to be set out in the bill. As rule 20 does not define the method by which the disregard of this requirement by the pleader shall be taken advantage of, I infer that its intention is to leave that matter in each instance to the discretion of the court. My own opinion, in the absence of conclusive authorities on the subject, is that the failure of the bill to give merely the places of residence of the plaintiffs and defendants is not of sufficient gravity to require resort to a demurrer. I think it would be competent for the court to require the residences to be stated in the bill by amendment on the spot, without delay, on motion.

But the defect of the bill in this case is graver than the mere failure to give residences. There is a jurisdictional omission, more serious than the mere failure to conform to rule 20 in equity. It would not be sufficient for a bill to set out that John Doe, a citizen and resident of Maryland, complains of Richard Roe, a citizen and resident of Virginia. If there were but one judicial district in Virginia, the omission to state Richard Roe's place of residence might not be demurrable, and might be amended on mere motion. But there are two districts in Virginia, and the bill must give jurisdiction in the district in which the suit is brought. It is of jurisdictional essence that the bill shall allege that Richard Roe is a citizen of Virginia, resident at some place, alleged to be in the eastern district of Virginia. The bill at bar uses no other language in describing the defendants than to say that the suit is against "the Richmond & Manchester Railway Company, and the Richmond Railway & Electric Company, corporations duly incorporated under the laws of the state of Virginia, and as such citizens of Virginia." That is all. There is no allegation that the defendant companies are residents, respectively, of Richmond and of Manchester, in the eastern district of Virginia; having their offices for the transaction of all their business (Code Va. § 1104) in Richmond and Manchester, respectively, in the eastern district of Virginia. The omission is jurisdictional, and is demurrable. The fact that a corporation is resident in Richmond, and has its office for the transaction of all its business in Richmond, cannot be implied from the mere circumstance that "Richmond" is a word

used in its corporate name. It is a fundamental rule of pleading that implications cannot supply allegations. Certainty and precision are of the essence of pleading, and all material averments must be positive and express. Implications, even necessary implications, can never dispense with material allegations. The bill here is demurrable and defective in not containing all averments giving jurisdiction of the cause to the circuit court of the United States for the eastern district.

I have not time at present to consider the remaining grounds of demurrer set out by the two defendants in the cause. I will say, however, that, whether these grounds be valid or not, the bill is amendable in the respects enumerated, on motion of complainants.

I do not think that the paper called the "answer of defendants" is yet in the cause, except as an affidavit. The defendants are not bound to file an answer in the present stage of the cause.

Monday 20, 08 STATING PART.

Apr.

Seals v. *Robinson, 75 Ala. 363. (1883.)*

APPEAL from Pike Chancery Court.

Heard before Hon. JOHN A. FOSTER.

This was a bill in equity by J. M. Robinson & Co., a mercantile partnership, carrying on business in Louisville, Kentucky, simple contract creditors of S. J. Seals, against the said Seals, R. C. Seals, his wife, and W. A. Weldon, seeking to have vacated and set aside, as fraudulent and void, a deed executed by S. J. Seals to his wife, bearing date 17th June, 1881, and conveying to her several lots of land, situated in the city of Troy, in this State; and to have the property conveyed by the deed sold for the payment of complainants' demand; and it was filed on 20th February, 1882. As appears from the averments of the bill, and from the proof, the complainants sold S. J. Seals, on 29th and 30th days of September, 1881, goods, wares and merchandise, amounting in price to nearly one thousand dollars, on credit, and without security, the debt maturing at two and four months; on which was paid, on 24th November, 1881, the sum of two hundred dollars. The bill alleges: "That at the time said purchases were made, the said S. J. Seals

held and owned in his own name and right a large amount of real estate and personal property, of great value, to-wit, eight or ten thousand dollars, consisting of valuable brick storehouses in the city of Troy, and dwellings and lots in said city, and stock in trade and choses in action, as represented by him, of the value of four thousand dollars; and that upon the faith of said real and personal property, so owned by him and held and standing in the name of said S. J. Seals, in his own right as aforesaid, your orators were induced to sell and credit and trust said S. J. Seals, and sell and deliver to him goods, wares and merchandise upon the credit aforesaid. Orators further aver that, at the time the said S. J. Seals made the purchases aforesaid, he had himself reported in commercial circles as being worth, over and above all liabilities, in his own right, twelve thousand dollars; and through these representations, and his property aforesaid, he was enabled to obtain credit and to be trusted." It is then averred that on 9th January, 1882, the said S. J. Seals filed in the office of the judge of probate of said county, for record, the deed in question, which is made an exhibit to the bill. The consideration expressed in the deed is the natural love and affection which the grantor had and bore towards his wife, the grantee, and the property is conveyed to her in fee simple, to have and to hold "as her separate property under the statutes of the State governing the estates of married women." After averring the execution by S. J. Seals, on 17th February, 1882, of an assignment of all his property, then owned by him, to W. A. Weldon, his father-in-law, as assignee or trustee for the benefit of his creditors, the bill proceeds: "Your orators further represent to your Honor, and aver the fact so to be, that the said deed made by said Seals to his said wife, R. C. Seals, was not executed on the 17th day of June, 1881, but was executed some time after that date, to-wit, about the 9th day of January, 1882. But orators aver that if they are mistaken in this, then they aver that said deed was not delivered on said day, and was never in fact delivered until the 9th day of January, 1882, when the same became, for the first time, a matter of record."

It is also averred that said deed was without valuable consideration; that at the time of its execution, the said S. J. Seals was financially embarrassed and in failing circumstances, which was known to his wife; that it was executed and delivered by him with the intention, and for the purpose of hindering, delaying and de-

frauding the complainants and his other creditors; and that such fraudulent intention and purpose were known to his wife, and the deed was accepted by her in furtherance thereof. The bill then contains this averment: "And plaintiffs aver that if said deed [was executed and delivered] at the time it purports to have been executed and delivered, there was a secret understanding and agreement between the said Seals and his wife, that the same should not become a matter of record at said time; and so far as the existence of the said deed was concerned, the whole commercial world was kept in blissful ignorance thereof, until the said Seals had purchased all the goods he wanted, amounting to several thousand dollars [in value], and had disposed of the same; and then, for the first time, it came to light, after the same had been concealed from your orators, and all persons, for the period of nearly seven whole months; and all this time the said Seals, his wife consenting thereto, was holding himself out to the world as the owner, in his own right, of said property, for the purpose of defrauding his creditors, and those with whom he might afterwards deal on credit and trust." It is also charged that the deed is fraudulent, as to prior and subsequent creditors, in that said Seals "had a reservation therein in favor of himself, being the trustee of his said wife, to control and enjoy the rents of said property, without accounting to any one for the same." The bill was subsequently amended, averring the death of S. J. Seals after the filing of the original bill, and making his administrator a party defendant.

To the bill as amended Mrs. Seals and W. A. Weldon filed a demurrer, the character of which is stated in the opinion. The demurrer was overruled, and the defendants answered. Mrs. Seals, in her answer, which was not under oath, averred, and testimony introduced on her behalf tended to show, that the deed in question was executed and delivered at or about the time it bore date, for the *bona fide* purpose, on the part of herself and husband, of making a provision for her and three children, minors of tender years, her husband being induced thereto by bad health, and an apprehension of an early death from a chronic disease with which he was then afflicted, and also a desire to avoid an administration upon his estate; and that she did not have the deed recorded at an earlier date, because she was not advised of the necessity of registration, and was finally induced to have it recorded by a sug-

gestion from a third party, that the record would be proof of its contents in the event of a loss. She admitted that her husband owed debts at the time of the execution of the deed, but denied that he was then financially embarrassed, and also the averments of the bill charging fraud.

The material facts and circumstances disclosed by the evidence for the complainants, on which they relied to sustain the averments of fraud contained in the bill, are sufficiently indicated in the opinion. There was no direct or positive evidence introduced by them, that the wife had any knowledge of the husband's financially embarrassed condition when the deed was executed, or of his intention to hinder, delay and defraud his creditors, or of any other fraudulent intention or purpose on his part; or that she combined and conspired with him for the purpose of perpetrating any fraud; or that she withheld the deed from record for any fraudulent purpose.

On the hearing, had on pleadings and proof, and on a motion to dismiss the bill for want of equity, the chancellor caused a decree to be entered, overruling the motion, declaring the deed fraudulent and void, and granting relief to the complainants. The decree also overrules "the exceptions to the testimony"; but the record fails to disclose these exceptions, or their nature or extent.

The rulings of the court, in overruling the demurrer, the motion to dismiss, and the exceptions to testimony, and in granting relief to the complainants, are here assigned as error.

BRICKELL, C. J.:

The rules of pleading in a court of equity, as to matters of form, are not so strict as the rules originally prevailing in courts of common law. The statutory requirement in reference to bills in equity is, that they "must contain a clear and orderly statement of the facts on which the suit is founded, without prolixity or repetition, and conclude with a prayer for the appropriate relief." A bill conforming to this requirement, under the practice and the decisions of this court, would have been deemed unobjectionable before the enactment of the statute. The statute has not, however, been construed as in derogation of the *cardinal rule*, as it has been frequently termed, that the bill must show with accuracy and clearness all matters essential to the complainant's right to relief. These matters must not be made to depend upon inference,

nor will ambiguous averments of them be accepted as sufficient. The averments must be direct and positive, not uncertain and inconclusive.—*Spence* v. *Duren,* 3 Ala. 251; *Cockrell* v. *Gurley,* 26 Ala. 405; *Duckworth* v. *Duckworth,* 35 Ala. 70. A bill may be framed in a double aspect; alternative averments may be introduced; but each alternative must present a case entitling the complainant to the same relief. The bill is demurrable, if in either alternative the complainant is not entitled to any relief, or is entitled to relief essentially differing in character.—*Andrews* v. *McCoy,* 8 Ala. 920; *Lucas* v. *Oliver,* 34 Ala. 626; *Rives* v. *Walthall,* 38 Ala. 329; *David* v. *Shepard,* 40 Ala. 587; *Micou* v. *Ashurst,* 55 Ala. 607.

If the original bill contains alternative averments, and either averment is insufficient to support the right of the complainant to the relief prayed, the objection was not presented in the chancery court by demurrer. Advantage of it was claimed only by motion to dismiss for want of equity. A motion to dismiss for want of equity is not the equivalent of a demurrer; nor is it appropriate to reach mere defects or insufficiencies of pleading curable by amendment, which is matter of right at any time before final decree. It should be entertained only when, admitting the facts apparent on the face of the bill, whether well or illy pleaded, the complainant is without right to equitable relief. When it is apparent, if the facts were well pleaded, a case of relief would exist, the defendant should be put to a demurrer, specifying the grounds of objection, affording the complainant the opportunity of removing them by amendment.—*Hooper* v. *S. & M. R. R. Co.,* 69 Ala. 529. The demurrer interposed was general; it fails, in the words of the statute, "to set forth the grounds," and the statute prohibits the hearing of it.—*Hart* v. *Clark,* 54 Ala. 490.

Objections to the admissibility of evidence, in chancery, ought to be reduced to writing, and a reference to them should be incorporated in the note of submission, or they should be otherwise called directly to the attention of the chancellor. If the fact that they have been made is not noted in the submission, or it is not otherwise shown that they were called to the attention of the chancellor, and he does not notice them, on appeal, the presumption is that they were waived.

It is settled by a long line of decisions in this court, that a voluntary conveyance, a conveyance not resting upon a valuable consider-

ation, is void *per se*, without any regard to the intention of the parties, however free from covin or guile they may have been, as to the existing creditors of the donor, without regard to his circumstances, or the amount of his indebtedness, or of the kind, value or extent of the property conveyed, if it be not exempt from liability for the payment of debts. As to subsequent creditors, if it be not shown that there was *mala fides*, or fraud in fact in the transaction, the conveyance is valid and operative. But if actual fraud is shown, it is not of importance whether it was directed against existing or subsequent creditors; either can successfully impeach and defeat the conveyance, so far as it breaks in upon the right to satisfaction of their debts. The distinction between existing and subsequent creditors is, that, as to the former, the conveyance is void *per se*, for the want of a valuable consideration; as to the latter, because it is infected with actual fraud.—*Miller* v. *Thompson*, 3 Port. 196; *Cato* v. *Easley*, 2 Stew. 214; *Moore* v. *Spence*, 6 Ala. 506; *Costillo* v. *Thompson*, 9 Ala. 937; *Thomas* v. *DeGraffenreid*, 17 Ala. 602; *Foote* v. *Cobb*, 18 Ala. 585; *Stokes* v. *Jones*, Ib. 734; s. c. 21 Ala. 731; *Gannard* v. *Eslava*, 20 Ala. 732; *Randall* v. *Lang*, 23 Ala. 751; *Stiles* v. *Lightfoot*, 26 Ala. 443; *Huggins* v. *Perrine*, 30 Ala. 396; *Cole* v. *Varner*, 31 Ala. 244; *Pinkston* v. *McLemore*, Ib. 308; *Williams* v. *Avery*, 38 Ala. 115. The right of the subsequent creditor depends upon the existence of actual fraud in the transaction; the burden of proving it rests upon him.—Bump on Fraud. Con. 308. The general rule applies, that fraud must be proved; it will not be presumed, if the facts and circumstances shown in the evidence may consist with honesty and purity of intention. But it must not be supposed that fraud must be proved by direct and positive evidence, or that it is incapable of proof by circumstances leading to a rational, well grounded conviction of its existence. There is no fact which may be the subject of controversy in a judicial proceeding, civil or criminal, that is not the subject of proof by circumstantial, as distinguished from positive or direct evidence. As the fraud visiting a transaction at the instance of creditors lies in the intention of the parties to it, vicious intent is not generally susceptible of proof otherwise than by evidence of circumstances indicative of it. The intention is a mental emotion, of which the external signs are the acts and declarations of the parties, taken in connection with the concomitant circumstances.—*Hubbard* v. *Allen*, 59 Ala. 283; *Harrell* v. *Mitchell*, 61 Ala. 270;

Thames v. *Rembert,* 63 Ala. 561; *Pickett* v. *Pipkin,* 64 Ala. 520.

The conveyance now assailed by subsequent creditors of the grantor is of real estate, is purely voluntary, founded upon no other consideration than love and affection, and the controlling purpose of its execution was a provision for the wife of the donor. It is made directly to the wife, without the interposition of a trustee, and at law is a mere nullity. All contracts and conveyances made between husband and wife directly, at common law, are invalid, for the reason that husband and wife are regarded as but one person, and the legal existence of the wife is merged in that of the husband. —*Gamble* v. *Gamble,* 11 Ala. 966; *Puryear* v. *Puryear,* 12 Ala. 13; *Bradford* v. *Goldsborough,* 15 Ala. 311; *Frierson* v. *Frierson,* 21 Ala. 549. The statutes creating and defining the separate estates of married women are not in abrogation of this doctrine of the common law; they are not intended to sever the unity of the husband and wife, so far as to confer on them capacity to contract with, or to convey directly to each other.—*Short* v. *Battle,* 52 Ala. 456; *McMillan* v. *Peacock,* 57 Ala. 127. Although this is the recognized doctrine of the common law, a court of equity, when the contract or conveyance is fair and just, will give to it full effect and validity.— *Williams* v. *Maull,* 20 Ala. 721; *Williams* v. *Avery,* 38 Ala. 115; *McWilliams* v. *Ramsey,* 23 Ala. 813; *Andrews* v. *Andrews,* 28 Ala. 432; *Spencer* v. *Godwin,* 30 Ala. 355. As a gift or conveyance by the husband to the wife directly is invalid at law, and is valid only in a court of equity, it is regarded as creating in the wife an equitable separate estate, though it may not contain words denoting that it is for her sole and separate use, or words in exclusion of the marital rights of the husband; and that the estate is not consequently within the influence or operation of the statutes enabling the wife to take and hold the property owned by her at the time of the marriage, or to which she may become entitled subsequently. —*McMillan* v. *Peacock, supra; Ratcliffe* v. *Dougherty,* 24 Miss. 181; *Warren* v. *Brown,* 25 Miss. 66; *Short* v. *Battle, supra.*

The conveyance is of all the visible, tangible property of the donor, subject to execution at law. All that he retained, consisted of choses in action, of uncertain, doubtful value. It is said by Judge Story that, "if a husband should by deed grant all his estate or property to his wife, the deed would be held inoperative in equity, as it would be in law; for it could, in no just sense, be deemed a reasonable provision for her (which is all that courts of equity hold

the wife entitled to); and, in giving her the whole, he would surrender all his own interests." 2 Story's Eq. § 1374. In *Coates* v. *Gerlach,* 44 Penn. St. 46, the court said: "A conveyance that denudes a husband of all, or the greater part of his property, is much more than a reasonable provision for a wife; for in considering what is, and what is not a reasonable provision, the circumstances of the husband are to be regarded, his probable necessities as well as his debts. Equity will not assist a wife to impoverish her husband." Whether a court of equity would refuse to enforce this conveyance upon the ground that the provision for the wife is unreasonable, and that giving to it effect would work injustice to the husband, it is not necessary to consider. The circumstances of each case must be considered as determining the reasonableness of a provision for wife or children, and a conveyance may be valid *inter partes,* which the court would not hesitate to pronounce fraudulent as to creditors.—*Jones* v. *Obenchain,* 10 Gratt. 259; 1 Bish. on Mar. Women, § 755. When the rights of creditors are involved, the extent and value of the property conveyed, its kind and character, are all facts to be considered in determining whether the transaction is infected with a covinous intent. The fact that a donor strips himself of all visible, tangible property which is subject to execution at law, retaining only choses in action of uncertain, doubtful value, may not be conclusive proof of fraud; taken alone it may be weak and inconclusive; but it will awaken suspicion and add strength to other circumstances which may in themselves be also insufficient to prove that his intent was fraudulent. And it is his intent, not the intent of the donee, which is material; the fraud of the donor is visited upon the donee, though he may be *doli incapax,* or though his intentions may be fair and honest, for he comes in as a volunteer, and has no equity which will protect him against the rights of creditors.—*Pickett* v. *Pipkin,* 64 Ala. 520.

The conveyance is not only of all visible property of the donor subject to execution at law, the value of which far exceeds the highest estimate of the value of the choses in action he retained, but it contains the unusual, if not remarkable provision, that the donee shall hold the property conveyed "as her separate property under the statutes of the State governing the estates of married women." The effect which would be given this clause of the conveyance, or whether it is capable of being construed as limiting

and qualifying the estate, narrowing its incidents, lessening the dominion of the donee, as the estate is created by the general words which precede it, is not now of importance. Whether it is, or is not valid and qualifying as a limitation, subjecting the estate and the wife's dominion to the properties of a statutory estate, which is, in but a limited sense, a separate estate, it is indicative of the intention of the donor; and that intention is, in one aspect, now of the highest importance. Subjecting the estate to the statute would vest it in the donor as husband and trustee for the donee, entitling him to his rents and profits, so long as he continues in that relation, freed from liability to account to the donee, and exempt from liability for his debts. In other words, he does not part with the property absolutely, but reserves to himself a specific benefit which it is to yield, though the ownership is vested in the donee.

Another circumstance it is of importance to consider. More than six months passed after the execution of the conveyance before its registration. Whatever may have been the general circumstances of the donor at the time of the execution of the conveyance, and upon this point the evidence is not so clear and satisfactory as it could probably have been made, the fact is, that when the conveyance was delivered to the judge of probate for registration, he was insolvent, and, in but little more than a month thereafter, made a general assignment for the benefit of creditors. During the interval between the execution and registration of the conveyance, he continued in possession, claiming ownership of the property, vouching the ownership as entitling him to credit, and upon the faith of it obtained credit. The omission to register the conveyance is but a fact or circumstance indicative of fraud, and is open to explanation, which, if just and reasonable, would neutralize all unfavorable inferences that may be drawn from it. The only explanation now offered is, that the donee was ignorant of the necessity for registration; ignorant that the law required registration to protect her from the claims of subsequent purchasers from the husband, or from the claims of judgment creditors. This is ignorance of law, which can not be accepted as explanatory of the omission. But she was not ignorant that the husband, after the execution of the conveyance, and before its registration, embarked in a new mercantile enterprise, contracting debts to a large amount. Nor is ignorance of the necessity of registration, or of

the duty of giving publicity to the fact that he was not the owner of the property, imputed to him. The evidence is conclusive that he concealed the fact of the conveyance, and represented himself as having title.

The omission to register the conveyance, the want of notoriety of its existence, the magnitude of the property conveyed, when compared with the value of that which was retained, the attempted reservation of a specific benefit to the donor, which he could hold free from liability for debts, his engagement in business very soon after the execution of the conveyance, obtaining a false credit because of his possession and representations that he was the owner of the property, to which, to say the least, the donee by her supineness contributed, are all badges of fraud, or circumstances indicative that the intent of the donor was the hinderance, delay, and fraud of creditors. Bump on Fraud. Con. 308. It is not of importance, whether the intent was directed against present or subsequent creditors; in either event, the conveyance may be successfully impeached by a subsequent creditor. We concur in the conclusion of the chancellor, that the conveyance must be deemed fraudulent as to creditors, prior or subsequent, and the decree is of consequence affirmed.

Dorn v. *Geuder, 171 Ill. 362. (1898.)*

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook County; the Hon. O. H. HORTON, Judge, presiding.

This was a bill in chancery filed on the 20th day of April, 1895, by the appellee Philip Geuder, as executor of the last will and testament of Johann Geuder, deceased, and Edward S. Dreyer, trustee, against Gay Dorn, the appellant, and his wife and others, for the foreclosure of a certain trust deed. The bill alleged "that on March 3, 1890, Gay Dorn, for value received, made his one principal promissory note of that date, and thereby promised to pay to the order of Emil Dickmann the sum of six thousand dollars ($6000) in three years after said date, with interest at the rate of six per cent per annum, payable semi-annually, said several installments of interest being evidenced and secured by six interest notes or coupons executed by said Gay Dorn to the order of said Emil

Dickmann, each for the sum of one hundred and eighty dollars ($180), which were due, respectively, in six, twelve, eighteen, twenty-four, thirty and thirty-six months after the date thereof, both principal and interest to bear interest at the rate of eight per cent per annum after maturity, and payable at the banking office of E. S. Dreyer & Co., Chicago, Illinois; that said notes were afterwards endorsed by said payee, Emil Dickmann, and delivered to Johann Geuder, who became the legal holder and owner thereof, and so remained up to the day of his death, to-wit, August 11, 1894; that to secure the payment of the said notes the said Gay Dorn executed and delivered to complainant Edward S. Dreyer, trustee, a deed of trust of even date with said notes, thereby conveying to said trustee, in fee simple, the following described real estate, with all the buildings and improvements thereon, to-wit: (Here follows description of mortgaged premises;) that said principal note was given to evidence, and said trust deed to secure, the balance of the purchase money for the property above described, together with interest thereon for said period of three years; that it is provided in said trust deed that if default be made in the payment of the said notes or the interest thereon, or any part thereof, or in case of waste or non-payment of taxes or assessments, or neglect to procure or renew insurance, or in case of the breach of any of the covenants therein contained, then the whole of the principal of said notes shall thereupon, at the option of the legal holder thereof, become immediately due; that default has been made in the payment of the principal sum of said note, together with a large amount of interest thereon; that there is now due the whole of the principal of said notes, being the sum of six thousand dollars ($6000), with interest thereon from March 3, 1890." The bill also alleged the trust deed contained an agreement to pay solicitor's fees of the complainants' solicitor in case of a foreclosure, and that the other parties defendant claim some interest in the mortgaged premises, and concluded with a prayer that a decree be entered foreclosing the trust deed and for sale of the property, and for a decree *in personam* for any deficiency, and for such other and further relief as the nature of the case might require.

The appellant filed an answer to the bill, alleging payment of each of the said six interest notes or coupons mentioned in the bill, and that by agreement between the parties the time of the payment of the principal indebtedness was extended for the term of one year,

to-wit, to the 3d day of March, 1894, in consideration of the payment by appellant of the sum of $60 as a bonus for said extension, and the execution by the appellant of two interest notes for the payment of the interest semi-annually upon the said principal sum for the period of time to which payment of the said principal note was so extended; that appellant paid both of said last mentioned two interest notes or coupons, and that on or about the said 3d day of March, 1894,—the date to which the said principal note was extended by the said agreement,—the parties again agreed that, in consideration of the sum of $120 paid by the said appellant, the time of the maturity of the said principal debt should be and was extended for the further term of three years, until, to-wit, March 3, 1897; that the appellant executed and delivered to the complainants his certain six notes or interest coupons for the semi-annual interest to accrue upon the said principal sum for and during the time to which, by the said agreement, the maturity of the principal sum was extended; that said appellant paid the interest for the said period of six months evidenced by the first of said interest or coupon notes, and said first note was delivered to him; that the second of said last mentioned interest notes fell due under said agreement on the said 3d day of March, 1895, and that by a further agreement between the parties, based upon a sufficient consideration, it was agreed that for the convenience and accommodation of the complainants the appellant would endeavor to negotiate a loan from other parties of a sufficient amount to discharge the principal sum (which, aside from the said last mentioned agreement, would not mature until March 3, 1897), and the interest coupon which fell due March 3, 1895, and that while he was in good faith endeavoring to negotiate said loan, complainants, in violation of the agreement, filed the bill for foreclosure. The answer contained other averments, which, in the view we take of the case, need not be adverted to.

To this answer the complainants filed a general replication, averring that the allegations of their bill of complaint were true, and that they would aver, maintain and prove the same to be true, and that the answer of the appellant was uncertain, untrue and insufficient.

The issue thus raised by the bill, answer and replication was referred to the master to take proof, and report his conclusions of both law and fact. The proofs were taken and the report of

the master filed. The substance of the report of the master was, that the allegations of the appellant that the time of the maturity of the principal note had been extended to March 3, 1897, were sustained by the proofs, and that the appellant had paid the interest coupons mentioned in the bill, and also each of the interest notes or coupons afterwards executed by and in pursuance of the agreements extending the time of the payments of the principal sum, except the interest note or coupon due on the 3d day of March, 1895. As to the allegations of the answer as to an extension of the time of the payment of the interest note which fell due March 3, 1895, the report of the master is as follows: "I find from this evidence that no agreement for an extension on the said March 3, 1895, coupon was made; that the language testified to by Dorn is too indefinite to constitute an agreement for an extension; that Dorn fails to show that at any time he had any substantial negotiations pending for the procurement of the principal, and as no definite time is stated by Dorn to which said note was extended, it was an assumption on his part, which was not justified by the language, that the time of payment of the interest was extended. I therefore conclude that complainants had a right to declare the principal due for non-payment of the interest due March 3, 1895." The master found and reported that said interest coupon falling due March 3, 1895, was paid by the appellant to the appellee executor on the 25th day of May, 1895, which was a little over a month after the filing of the bill herein.

Appellant filed exceptions to the findings of the master as to the facts relative to the alleged agreement for the extension of the payment of the interest coupon which fell due March 3, 1895, and to the legal conclusions of the master as to the right of the appellees, under the allegations of the bill, to foreclose the trust deed. The exceptions were overruled and a decree of foreclosure and sale entered, and the decree was affirmed by the Appellate Court on appeal. This is a further appeal of the said mortgagor, Dorn, to reverse the judgment of the Appellate Court.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The case made by the allegations of the bill is, that the appellant had made default in the payment of the principal note according to its tenor and effect, and also in the payment of the six coupon notes given at the time the principal note was executed to evidence

the liability of the appellant to pay interest semi-annually on the principal note from the date thereof to the 3d day of March, 1893, the date of its maturity.

It appeared from the report of the master, which, in this respect, it is conceded is fully supported by uncontroverted testimony, that appellant had paid each of said interest notes mentioned in the bill, and was not, in respect of any of them, in default. It also appeared from the master's report and from like uncontroverted testimony, that the payment of the principal note had been extended, by an agreement based upon a good and sufficient consideration, for the term of one year, to-wit, to the 3d day of March, 1894, and again extended by a like binding agreement for the further period of three years, to-wit, to the 3d day of March, 1897, and was not due when the bill was filed, to-wit, on the 20th day of April, 1895. The case made by the bill was fully met and overcome by the proofs. The master found that the maturity of the mortgage debt had been extended to March 3, 1897, but that it was proven appellant had not paid the interest coupon which, under the terms of the contract of extension, fell due on the 3d day of March, 1895, promptly at maturity, and that the appellees had the right to declare the mortgage debt due and payable because of such default, and on this finding decree was entered against the appellant. The case, then, upon which the appellees succeeded, was, that the principal of the indebtedness to them did not fall due until March 3, 1897, but that by reason of the failure of appellant to pay the semi-annual installment of interest promptly on the 3d day of March, 1895, the right accrued to them, under the terms of the agreement extending the maturity of the note to March 3, 1897, to declare the principal sum due and payable, and to proceed at once to foreclose the mortgage. But the appellees made no such case by the pleading. They were not entitled to a decree of foreclosure upon the case alleged in their bill, for it was disproved. It is not sufficient, if true, that the evidence disclosed a state of case upon which a bill could have been framed which would have entitled them to a decree, for the reason such evidence is not applicable to the allegations of the bill. If the allegations of a bill are overcome by the proof, the complainant cannot have a decree because it may appear that issues might have been made by other pleading upon which he would have been entitled to relief. Appellees might, upon the coming in of the master's report, or at any time before the rendition of the decree,

have applied for and obtained leave, upon such terms as the court should deem just, to make such amendments to their bill as might be found necessary to state a case entitling them to a decree under the evidence produced upon the hearing. But no such course was taken, and the question presented by the record is, whether the appellees were entitled to a decree under the allegations of their bill.

It is a fundamental rule of equity pleading, that the allegations of a bill, the proof and the decree must correspond, and that the decree cannot give relief that facts disclosed by the evidence would warrant where there are no averments in the bill to which the evidence can apply, and that if the evidence disproves the case made by the bill the complainant cannot be given a decree upon other grounds disclosed by the proofs, unless the court permits the complainant to amend his bill so as to present the case disclosed by the evidence. *McKay* v. *Bissett,* 5 Gilm. 499; *Morgan* v. *Smith,* 11 Ill. 194; *White* v. *Morrison,* id. 361; *Rowan* v. *Bowles,* 21 id. 17; *Chaffin* v. *Heirs of Kimball,* 23 id. 36; *Bremer* v. *Canal Co.,* 123 id. 104; *Russell* v. *Conners,* 140 id. 660; *Ohling* v. *Luitjens,* 32 id. 23; *Burger* v. *Potter,* id. 66.

We make no ruling on the contention of appellant that under the agreement between the parties with reference to the interest note which fell due March 3, 1895, it was necessary to the right of appellees to institute the suit, they should have first given appellant notice and an opportunity to pay the coupon. If the bill is amended, and the right to declare the mortgage debt due because of the alleged default in the payment of that interest coupon be made the basis of the right to institute the suit to foreclose the mortgage, the appellant may answer the amended bill and raise an issue on the point upon which both parties can be fully heard and the right of the matter properly determined.

The decree of the circuit court and the judgment of the Appellate Court are reversed and the cause will be remanded to the circuit court, where appellees may proceed further, as they may be advised.

Reversed and remanded.

Perry v. *Carr*, 41 N. H. 371. (1860.)

THE facts in this case sufficiently appear from the opinion of the court.

BELLOWS, J.:

This is a bill in equity to redeem a tract of land in Hopkinton from a sale on execution of the equity of redemption, to the defendant, in May, 1859, and to compel the release to the plaintiff of the interest acquired by such sale. The bill alleges that the plaintiff, having acquired by deed the title of Bowers, the execution debtor, tendered to the defendant, November 29, 1859, the amount of the purchase money and interest and reasonable charges, and demanded a release of his interest; to which the defendant demurs for want of equity, and in his argument assigns for cause that the bill does not allege that the plaintiff has always been ready and is still ready to pay the money tendered; and makes no offer to pay.

Upon examination, it appears that the bill contains no such allegations, and we are therefore of the opinion that the demurrer is well taken. In general, the plaintiff must state in his bill a case upon which, if admitted by the answer, or proved at the hearing, this court can make a decree. 1 Dan. Ch. Pr. 412. The right, title, or claim of the plaintiff should be stated with accuracy and clearness, so that the defendant shall be informed what he is to meet. Story, Eq. Pl., secs. 240, 255, 257. Where the plaintiff, in a bill to redeem, claimed under a levy of execution, but failed to state a return of the execution and record, on demurrer the bill was held to be defective. *Hobart* v. *Frisbe*, 5 Conn. 592; and see *Crocker* v. *Higgins*, 7 Conn. 342. On a bill to enforce a reconveyance of land, it was held that the plaintiff should aver a readiness to pay the money. *Buffum* v. *Buffum*, 11 N. H. 459. In *Frost* v. *Flanders*, 37 N. H. 547, Perley, C. J., holds that a bill to enforce a contract for the conveyance of land, when the plaintiff relies upon a tender of the price, should contain an offer to pay; and so in a bill or other proceeding to obtain a release, after tender of the appraised value of land set off on execution. In that case it is held that when an execution is extended upon land, and the debtor, in a writ of entry, relies on a tender to discharge the land from the extent, he

must bring the amount tendered into court. For aught we can see, the case of a sale of the equity of redemption stands upon the same footing, the provisions for the redemption and release being substantially the same. The offer to pay the money tendered should therefore have been made in the bill, and the money brought into court, without which the plaintiff would not be entitled to a decree. The bill, therefore,

Must be dismissed.

CHARGING PART.

Smith v. *Clark, 4 Paige (N. Y.) 368. (1834.)*

THIS case came before the chancellor on appeal. The facts of the case, so far as they are necessary to the understanding of the decision, are stated in the former report of the case referred to in the opinion of the chancellor.

THE CHANCELLOR:

This is an appeal from the final decree of the vice chancellor of the eighth circuit, in the same cause which was formerly before me, on appeal from the equity court of that circuit, to reverse an order in relation to the injunction. (1 Paige's Rep. 391.) The case is substantially the same as it then appeared on the bill and answer. And upon a careful examination of the case, and the voluminous briefs of the counsel for the respective parties, I see no reason to change the opinion I then entertained. The error into which the plaintiff's counsel appears to have fallen, is in supposing that an answer responsive to the charging part of the bill is not evidence, in favor of the defendants. The charging part of a bill is as necessary to be answered as the stating part. So far as the charges are material to anticipate and defeat a defence which may be set up by the defendant, they may be considered in the nature of a special replication. But the complainant has the same right to the defendant's answer to the charging part of the bill, to prove the truth of his special replication, as he has to an answer to the stating part, to prove the truth of that. If he does not waive an answer on oath from the defendant, he makes him a witness in favor of the complainant, against himself, and interrogates him as to every statement and charge in the bill. His answer, therefore,

which is responsive to any such statement, or charge, in whatever part of the bill it is contained, is evidence in his own favor as well as in favor of the complainant. I know it has been supposed by many that the charging part of a bill is mere form; and that they might therefore put any thing they pleased in that part, by way of charge, even in a sworn bill. It is frequently, however, as material a part of the bill as the stating part; and the decision of the cause frequently turns upon the issue formed by the denial of some averment in the charging part of the bill. It is therefore perjury for a complainant to make a false charge, or averment, in the charging part of a sworn bill, in the same manner as it would be for him to make a false statement in the stating part.

The answer, as to the assignment and the consideration thereof, being evidence in favor of the defendants, the prior equity of Clark, to the extent of his debt, is undoubted; and as the complainant claims a mere equitable right of set-off, which accrued after the defendant Clark had an equitable right to the assignment, it is perfectly immaterial whether the complainant ever had notice of the assignment, or of Clark's equity or not. If he had paid the bond and mortgage, to the original holder, or had discharged any security which he held against him, under an actual agreement for a set-off, and without notice, it would have been a very different case from that which is now presented. I have no doubt as to the correctness of the vice chancellor's decision upon the equity of this case. He was also right as to the costs. If the complainant wished to exempt himself from costs, and to put the defendants in the wrong, he should have offered to pay the amount justly due to Clark, and have requested him to re-assign the mortgage to Ambrose Smith, so that a set-off between him and the complainant could be made. It is a general rule that a mortgagor who comes into this court and is permitted to redeem, must pay the costs of the adverse party.

The decree of the vice chancellor must be affirmed, with costs; and the proceedings are to be remitted.

CLAUSE OF JURISDICTION.

Goodwin v. *Smith*, 89 *Me.* 506. (1897.)

WALTON, J.:

This is a suit in equity. The plaintiff says that, being a shipper of granite, he bargained with the defendant for a parcel of land, consisting of about five-eighths of an acre, over which he was desirous of constructing a road for the transportation of his granite to the Saco River; that for said parcel of land he agreed to pay her and she agreed to accept three hundred dollars; that in pursuance of said agreement, and in part performance of the same, he paid the defendant one hundred dollars, and entered upon and took possession of the land and expended a large sum of money (about one hundred and seventy-five dollars) in building a culvert and making a passable road over the same, and has at all times been ready to pay the balance due for the land, and has several times offered so to do, if the defendant would give him a deed of it; but that the defendant, although she accepted and still retains the one hundred dollars advanced to her, has hitherto refused, and still refuses to give the plaintiff a deed of the land, falsely giving as an excuse for such refusal, that the contract was for a lease and not for a sale of the land; and the prayer of the plaintiff's bill is that the defendant may be compelled to specifically perform her said agreement, and give the plaintiff a good and sufficient deed of said land.

It is insisted in defense that the plaintiff's bill is fatally defective because it does not contain an allegation that the plaintiff has not a "plain, adequate, and complete remedy at law." If such an allegation was ever necessary, it is not so now. It is known as the jurisdiction clause, and to avoid unnecessary prolixity, has been abolished by a rule of this court. (Rule IV.) It has also been abolished by the United States Supreme Court. (Rule XXI.) And Judge Story says it was never necessary; that if the other facts stated in the bill do not show jurisdiction, this clause will not give it; and if the other facts stated in the bill do show jurisdiction, and are sustained by the proof, the bill will be sustained though this clause is omitted. Story's Equity Pleadings,

§ 34; and note 2, citing the rule of the United States Supreme Court.

It is further insisted in defense that the contract was oral, and that the evidence is insufficient to take it out of the operation of the statute of frauds. We think the evidence is sufficient. It is true that to take an oral contract for the sale of land out of the operation of the statute of frauds, the proof of a part performance of the contract, and the proof of the contract itself, must be clear and convincing. Or, as the rule is stated in *Bennett* v. *Dyer, ante,* 17, "the party making the attempt to take the case out of the statute of frauds must establish the existence of the oral contract by clear and satisfactory evidence." But we think the evidence in this case is clear and satisfactory. Viewed in the light of the undisputed acts of the parties, we think the oral proof shows beyond a reasonable doubt that the defendant did make such a contract as is set out in the plaintiff's bill, and that she accepted a hundred dollars in part performance of the contract, and permitted the plaintiff to take possession of the land and expend a large sum of money in constructing a road over it. And we think she must now be required to complete the performance of her contract, and give the plaintiff a good and sufficient deed of the land, as prayed for in his bill.

Decree accordingly, with costs.

INTERROGATING PART.

Miles v. *Miles, 27 N. H. 440. (1853.)*

IN EQUITY. The bill alleges that on the 26th day of March, 1841, Reuben Miles of Madbury, father of the orator, Abraham Miles, made and published his last will and testament; and on the 7th of August, 1841, made and published a codicil to his will. That Reuben died in Madbury, on the 23d day of June, 1845, and on the 1st day of July, 1845, the will and codicil were duly proved and allowed. That Reuben, by his will, among other things, devised to his daughter, Betsey Meserve, wife of Joseph Meserve, now of Wilson's Village, in the county of Niagara and State of New York, one-half in common and undivided of his homestead farm in Madbury, including all the land which Reuben then occupied, with

one-half of all the buildings thereon, and one-half in common and undivided of his wood lot, in Barrington, called the Waldron Hill lot, to have and to hold the same to her and her assigns, for and during the term of her natural life, and from and immediately after her decease, to such child or children of said Betsey, if any she should ever have, as might be living at the time of her decease, to have and to hold the same to such child or children, and its or their heirs and assigns forever; but in case Betsey should die without leaving any child of hers alive at the time of her decease, then and in that case, from and immediately after the decease of Betsey, to Abraham Miles, the orator, and Tichenor Miles of Madbury, one of the defendants, sons of the testator, in equal shares, to have and to hold the same to Abraham and Tichenor, their respective heirs and assigns forever.

That Reuben, also, among other things, devised to his daughter, Nancy Miles, another of the defendants, the other half in common and undivided of said farm, including all the land which Reuben then occupied, with one-half of the buildings thereon, and one-half in common and undivided of the Waldron Hill lot, to have and to hold the same to her and her assigns, during her natural life, and from and immediately after her decease, to such child or children as she might at that time have living, and to its or their heirs and assigns forever; but in case Nancy should die without leaving any child alive at the time of her decease, then and in that case, from and immediately after her decease, to Abraham Miles and Tichenor Miles, in equal shares, to have and to hold the same to them and their respective heirs and assigns forever.

That it was ordered by the will that the devises to Betsey and Nancy, and their heirs, should be subject to and charged with any devise that the testator might thereinafter make to his wife, Lydia Miles, another of the defendants, and to any incumbrance that he might order in her favor.

That Reuben gave to his wife one-third part of his homestead and the Waldron Hill lot, in common and undivided, so long as she should remain his widow.

The bill then charges that Betsey and Joseph Meserve, on the 14th of July, 1846, by their deed of that date, for a valuable consideration, conveyed to the orator all their right in the premises.

That Nancy and Lydia Miles applied to the judge of probate for partition of the premises, and the same were duly divided and

set off to the parties by a committee, and the decree of the judge of probate made thereon, the 4th of April, 1848. The particular parts assigned to the several parties interested are set forth in the bill.

That on the 17th of April, 1847, the complainant released to Betsey Meserve and her husband all his interest in the premises; and that John Kingman of Durham, another of the defendants, claims to hold that part of the premises set off to Betsey Meserve and Joseph, by a lease from them.

That Lydia Miles is about eighty years of age, and is still the widow of Reuben; that Betsey Meserve is fifty-six years of age, and never had any child; that Nancy Miles is forty-seven years old, and was never married, and never had any child.

That the complainant has reason to believe, and does believe, that the defendants intend to commit strip and waste on the premises so devised and divided, and that there is an understanding, if not an express agreement among them for that purpose; and that when the premises were divided, there was standing thereon a large amount of pine and oak wood and timber, and that there is still standing on some parts a large amount of pine and oak wood and timber.

That John Kingman has, as the orator has been informed and believes to be true, for about two years last past, cut and drawn away wood and timber to a large amount from that part of the premises devised and set off to Betsey Meserve; and that Kingman, during that time, has cut and drawn from the premises full twenty cords of pine wood, and sold the same; also pine logs, sufficient to make from five to ten thousand feet of boards, and converted the same to his own use, but not on said premises, and that the wood and timber were worth from $100 to $150; and that Kingman told the complainant, in the month of January before the filing of the bill, that he intended to cut wood on the premises that winter sufficient to last his fire two winters, and that Kingman never lived on any part of the premises.

The bill also charges Nancy Miles with having committed waste upon the premises to a considerable amount, and sets forth the particulars of the same. It also makes the same charges against Tichenor Miles, and states that the defendants pretend that they have a right to cut, as set forth in the bill.

The bill then states that "to the end, therefore, that the de-

fendants may, upon their several and respective corporal oaths, to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and they and every of them distinctly interrogated thereto, and that more especially said confederates may, in manner aforesaid, answer and set forth"—

Whether Reuben Miles made his will and codicil, and the devises therein set forth, and whether the will was proved, as in the bill is alleged.

When Reuben Miles died, and whether the real estate was divided, as set forth in the bill.

Whether deeds were given, as in the bill of complaint is alleged, and what deeds were given, and where.

What is the age of Lydia Miles, and Nancy Miles and Betsey Meserve, and whether Betsey and Nancy ever had any child.

Whether Kingman has any right to any part of the premises so divided; and what right and to what part and from whom, and when and on what terms and conditions.

Whether the defendants, or either of them, and which, have cut and hauled, or permitted to be cut and hauled, or caused to be cut and hauled, any wood and timber from the premises, and where and how much by each, and the value of the same, and what disposition each has made of the wood and timber so cut and hauled, or permitted or caused to be cut and hauled.

Whether the defendants, jointly or severally, have not sold the wood and timber, by them and each of them taken from the premises, and how much each has sold, and the value of the same, and where the same was sold, and whether there is not now a large amount of oak and pine wood and timber on the premises.

The bill then prays an injunction against the defendants and their agents from committing any further strip and waste on the premises, and from cutting and hauling wood and timber therefrom, beyond what tenants for life have a right to cut; and that the defendants be compelled to account for all the illegal cutting done by them, and to pay to the orator his just proportion of the value of the same. There is also a prayer for general relief.

To the answers of Betsey Meserve and Joseph Meserve and John Kingman, replications were filed, and to the answers of the other

defendants, Nancy Miles, Lydia Miles and Tichenor Miles, exceptions were filed.

The defendants not submitting to the exceptions, the questions arising upon the same are for the determination of the court.

EASTMAN, J.:

To the answer of Lydia Miles, the exception is taken that she has not answered and set forth whether the orator has reason to believe, and does believe, that the several defendants, naming them, intend to commit strip and waste on the premises devised by Reuben Miles, and whether there is not an understanding, if not an express agreement among them for that purpose.

Upon looking into the bill, we do not find any particular interrogatory specifically interrogating the defendants upon this point. But in the general allegations of the bill, the charge is made as set forth in the exception. There is also in the bill the general interrogatory or requisition that the defendants may severally and respectively, full, true, direct and perfect answers make to all and singular the premises, as fully and particularly as if the same were repeated, and they and every of them distinctly interrogated thereto.

There is nothing in the answer particularly denying this charge in the bill—nothing except the general and usual denial of all unlawful combination and confederacy; and the question is raised whether a defendant is obliged to answer the statements and charges in a bill, unless specifically interrogated thereto.

According to the present English practice, the general interrogatory is not sufficient. By the 16th of the orders of August, 1841, it is provided that a defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto. 2 Danl. Ch. Pl. & Prac. 820. But such was not formerly the practice.

The same rule has been adopted by the supreme court of the United States. Rules in Equity, 40 January term, 1842.

With us no rule of the kind has been adopted, and we adhere to the general practice of courts of chancery, which have no particular rules upon the subject, and require a defendant to answer all the allegations and charges in the bill which may be material to the plaintiff's case; and although, to prevent evasion on the part of the defendant, it may be well, and is usual, to add interrogatories concerning the matters considered to be most essential, yet, under the

general interrogatory, an answer is open to exception, if it omits to notice material charges and statements in the bill, concerning which no specific interrogatories are introduced. 1 Danl. Ch. Pl. & Prac. 432; Story's Eq. Pl. § 38; *Methodist Episcopal Church* v. *Jaques,* 1 Johns. Ch. Rep. 65; *Hagthorp* v. *Hook,* 1 Gill. & Johns. 270; *Salmon* v. *Claggett,* 3 Bland. 125; *Bank of Utica* v. *Messereau,* 7 Paige 517; *Parkinson* v. *Trousdale,* 3 Scam. 380; *Cuyler* v. *Bogert,* 3 Paige 186.

That matter has been settled in the same way in Massachusetts, by rule of court. Mass. Rules for the Regulation of Practice in Chancery, rule 5.

According to these suggestions, the defendant should have made answer to this charge in the bill. It is a material allegation of an intent to commit waste, and the exception must be sustained.

To the answer of Nancy Miles, two exceptions are taken. The first is, that she has not, to the best of her knowledge, remembrance, information and belief, answered and set forth whether John Kingman, during the time stated in the bill, cut and hauled from the premises full twenty cords of pine wood, and sold the same, and cut and drew from the premises pine logs sufficient to make from five to ten thousand feet of boards, and converted the same to his own use, but not on the premises; and whether the wood and timber were worth from one hundred to one hundred and fifty dollars, and that Kingman told the orator, in the month of January then last, that he intended to cut wood on said premises, the present winter, sufficient to last his fire two winters, and that Kingman never lived on any part of the premises.

The bill contains the allegation set forth in the exception, the answer to which is as follows: that Kingman held the premises, by lease from the Meserves, for two years, and that during said two years he had some pine trees cut for fencing, and sawed the same into boards; and during the latter part of the winter of 1850, or in the spring of that year, he caused some of the boards to be hauled and left at or near the different bars on the premises, and the same were afterwards used in repairing said bars. That Kingman used no fuel on the premises while he so occupied the same, and this defendant does not know that he took any from the place to be used elsewhere.

The answer to this allegation of the bill is far from being explicit. Kingman might have cut the timber alleged in the bill, and the de-

fendant, Nancy Miles, have known the fact, and still the answer be true; for he might have cut timber to be sawed for bars in addition to that specified in the bill.

She says, also, that she does not know that Kingman took any fuel from the premises to be used elsewhere. But if she had no knowledge upon the subject, she may have had information.

The answer to the part of the bill contained in this exception is entirely insufficient, and the exception must be sustained.

A defendant must answer as to his knowledge, remembrance, information and belief. If a fact is charged as within his personal knowledge, he must answer positively, and not as to his remembrance or belief. If facts are charged as having happened, but they are not within his own knowledge, he must answer as to his information and belief. And he must answer directly and without evasion. He must answer the substance of each charge, as well as literally the several matters charged. A general denial, also, is not sufficient, but there must be an answer to all the special circumstances and particular inquiries. *Hall* v. *Wood,* 1 Paige 404; *Devereaux* v. *Cooper,* 11 Vt. Rep. 103; *Utica Ins. Co.* v. *Lynch,* 3 Paige 210; Coop. Eq. Pl. 314; *Smith* v. *Lasher,* 5 Johns. Ch. Rep. 247; *Taylor* v. *Luther,* 2 Sumner 228; *Woods* v. *Morrell,* 1 Johns. Ch. Rep. 103; *Petit* v. *Candler,* 3 Wendell 618; Story's Eq. Pl. 852; *Mountford* v. *Taylor,* 6 Vesey, 792; 2 Dan'l Ch. Pl. & Prac. 830; *Morris* v. *Barker,* 3 Johns. Ch. Rep. 297; *Bank* v. *Lewis,* 8 Pick. 119.

The other exception to the answer of Nancy Miles is the same as that taken to the answer of Lydia Miles, and must be sustained accordingly.

To the answer of Tichenor Miles six exceptions are filed. The fifth and sixth are the same as those filed to the anwser of Nancy Miles, and they must be sustained for the reasons already given. The disposition of the other four involves the same question as that stated in deciding the first exception to the answer of Nancy Miles, and it is unnecessary to state here anything further than to say that upon the principles there laid down, we think, the first and second exceptions should be overruled, and the third and fourth should be sustained. The answer to the allegations embraced in the first and second exceptions is sufficient, while the answer to the allegations contained in the third and fourth exceptions is evasive and insufficient.

Bank v. *Levy*, 3 Paige (N. Y.) 606. (1832.)

This cause came before the chancellor on appeal by the defendants from the decision of the vice chancellor of the first circuit, overruling their exceptions to the master's report on exceptions to their several answers. The bill was filed by judgment creditors of the defendant Levy, after the return of their execution at law against him unsatisfied. The bill alleged, among other things, that the defendant Levy obtained moneys from the complainants' bank fraudulently, and by collusion between him and the defendant Wolfe, who was his son-in-law, by overdrawing his account; and charged that Wolfe received the money thus obtained from the bank, and still had the same, or a very large amount thereof, in his possession. The bill also charged that after Levy had so overdrawn his account with the complainants he petitioned for the benefit of the insolvent law. That the granting of his discharge was opposed; and upon that occasion both of the defendants in this suit were sworn and examined. That from such examination it appeared Levy had knowingly and fraudulently overdrawn his account with the complainants, for the purpose of placing the moneys thus obtained in the hands of Wolfe; that the moneys were placed in his hands accordingly, and he knew at the time that they had been obtained by such overdrawing; and that those moneys, or the greater part thereof, were in the hands of Wolfe at the time of such examination. The exceptions which were sustained by the vice chancellor, related principally to the neglect of the defendants to answer interrogatories founded upon the specific allegations in the bill as to what appeared from the examination of the defendants on that occasion.

The Chancellor:

Before going into the examination of the several exceptions particularly, it may be proper to notice a general objection, by the defendants' counsel, which is supposed by him to apply to the whole. It is said there are no charges in the bill to sustain the interrogatories upon which the exceptions are based; and therefore that the defendants were not bound to answer the matters enquired of by such interrogatories. The counsel is undoubtedly correct in

the principle that a defendant cannot be called upon to answer any interrogatory which is not founded upon some allegation or charge in the bill. (Mitford, 4th Lond. ed. 45. 1 Newl. Prac. 3d Lond. ed. 255.) But it is not necessary that the interrogatory should arise directly out of one of those material averments in the bill upon which the complainants' right to relief essentially depends. It is sufficient to entitle him to an answer to the interrogatory, if it is founded upon a statement in the bill which is set up merely as evidence in support of the main charges therein. In framing an ordinary bill in chancery the pleader has a two-fold object, discovery and relief. The allegations in the bill, so far as the question of the complainants' right to relief is concerned are substantially in the same form as the averments in a declaration at law. And the pleader must state his clients' cause of action in such a manner that the main facts upon which his right to relief depends may be put in issue and tried. But the complainant, in addition to this, has a right to examine the defendant, on oath, in support of the main charges upon which his claim to the interposition of the court in his favor is based, and also as to any collateral facts, which may be material in determining the extent, or kind of relief to which he is entitled, if the main charges in the bill are admitted or proved. He may, therefore, state any matters of evidence in his bill which may be material in establishing the main charge, or in ascertaining the nature or kind of relief proper to be administered; and may interrogate the defendant as to those matters. In this case some of the main facts, upon which the complainants seek relief against the defendant Wolfe, are, that the money was fraudulently obtained from the bank, and was placed in his hands without consideration, where it remained at the time of the examination before the recorder, when the circumstances of the fraud appeared upon the examination of these defendants on oath. And there can be no doubt, in this case, that if the fact is established that the money was improperly and fraudulently obtained from the complainants' clerks, and that Wolfe had notice of that fact before he parted with the money or paid a valuable consideration therefor, he cannot in equity be permitted to retain the same as against the just claims of the complainants thereon. (*Tradesmen Bank* v. *Merritt*, 1 Paige's Rep. 302.) The allegations in the bill as to what took place before the recorder are therefore material, not only to show that Wolfe then had notice of the fraud, while the money was still in his hands, but also as

evidence in support of the main charge of fraud and collusion, upon which the complainants' claim as against Wolfe mainly rests.

The fourth exception to the answer of Levy, which is the first allowed by the vice chancellor, relates to the amount due the complainants on their judgment. In a case of this kind the 189th rule requires the complainant to state the true sum due on his judgment, over and above all just claims of the defendant by way of set-off or otherwise. This allegation in the bill was therefore material; and the defendant probably intended to admit the whole amount of the judgment and the interest thereon to be due, as stated in the bill. But by a slip in the phraseology of the answer the proper admission is not made. I must therefore, though with some hesitation, affirm the decision of the master and the vice chancellor as to this exception.

The fifth exception is for not answering an interrogatory which calls upon Levy to disclose whether the overdrawing at the bank was not voluntary and premeditated. The charges in the bill are that the moneys were obtained by overdrawing, and by fraud and collusion between him and Wolfe, his son-in-law; and that it appeared on the examination before the recorder that the overdrawing was voluntary and premeditated. The discovery called for by this exception is material in the establishment of a fraud in obtaining the money from the bank. A wilful and intentional overdrawing, by a person who knew he had not the means of making good his account, might be a gross fraud, considering the manner in which business is done in the banks of our large commercial cities; especially if it should appear that several checks were drawn at the same time and presented separately, or by different individuals, so as to elude the vigilance of the officers of the institution, by giving to such checks the appearance of ordinary business drafts. Whereas if the drawer overdrew by mistake, or under the supposition that he would have funds there to meet the drafts at the time they were presented, or before the bank closed, the transaction would be perfectly fair and honest, if no means were resorted to for the purpose of preventing the officers of the bank from noticing the fact that he had not funds in the bank at the time. This exception was therefore properly allowed.

The sixth exception is founded upon an interrogatory, in the bill, calling upon Levy to disclose whether he delivered the checks, on which the money was obtained, to Wolfe, or to any other person for

his use; and to whom in particular. He says he delivered two of the checks to the clerk of Wolfe, but does not disclose who that clerk was. It may be material to ascertain who that clerk was, not only for the purpose of showing that the complainant's money went directly into the hands of Wolfe, but also to ascertain how much went there. Even if the separate answer of Wolfe could be referred to as an admission that the money came to his hands, it does not remove the difficulty; as he only admits the receipt of two thousand dollars, and there are no two of the checks corresponding in amount with such admission. The discovery of the particular individual to whom the checks were given may also be very material on other grounds, which it is not necessary here to state. The complainants having distinctly called for a discovery as to the person to whom the checks were given, there is no good reason assigned for withholding his name.

The eighth exception is founded upon an interrogatory calling upon Levy to state whether Wolfe is not now indebted to him; and if so, in what amount. I have not been able to find any allegation in the bill on which to sustain this interrogatory, to the extent claimed by this exception. Except from the allegation that it appeared on the examination before the recorder that Wolfe was then indebted to Levy, there is nothing on which to found a presumption that he was indebted to him at the time of filing the complainant's bill, or at any time since. And a defect in the charging part of the bill cannot be supplied by a subsequent interrogatory; which is to be construed by the charging part, and is not to be considered more extensive. The fact of the indebtedness at the time of the examination before the recorder, is admitted by the answer of Levy. But he further states, that subsequently, and before the filing of this bill, he compounded with Wolfe at the rate of twenty-five cents on a dollar, and received the amount thus agreed upon, in full satisfaction and discharge of his debt. As there is no suggestion of any subsequent indebtedness by Wolfe to him, I must consider this a perfect answer to every thing that could properly be inquired of, or which he was bound to answer under this interrogatory. This exception cannot therefore be sustained.

The tenth exception is evidently well taken; as the defendant Levy admits, by implication at least, that he has still in his possession a part of the moneys received from Wolfe on the compromise with him. The complainants are entitled to a discovery of the

nature and amount of all the property and effects of their judgment debtor, as well to sustain and prove the allegation in the bill that he had property to the value of $100 or more, so as to give this court jurisdiction to make a decree in their favor, as to have such property applied to the satisfaction of their debt.

The eleventh exception is not well taken. As there is no allegation or suggestion in the complainants' bill that the purchasers of the notes, or the other Carolina property, did not purchase that property fairly and bona fide, it would not benefit the complainants if Levy should admit that he sold the notes, and his interest in the other property, for less than half their value. Although the court might be satisfied that he parted with the property in that manner for the purpose of defrauding his creditors, yet, if the vendees purchased it in good faith, their title cannot be disturbed. And the establishment of the fraud against Levy would not make him liable to the complainants beyond the amount of their debt, for which he is liable in any event. If there had been any allegation in the bill, suggesting a fraudulent agreement between him and Wolfe to overdraw the bank, and then to sell off his property and to put the proceeds in the hands of the latter to keep it out of the reach of legal process, it might have presented a different question.

The permission to the complainants to amend their bill was a matter of course, under the 45th and 190th rules, upon the allowance of any of the exceptions for insufficiency. A majority of the exceptions to the answer of Levy not having been finally allowed, the complainants are only entitled to the costs of the original exceptions which were allowed. And neither party is to have any costs upon the reference, or upon the hearing before the vice chancellor, or upon this appeal. The order of the vice chancellor is to be modified accordingly.

The second exception to the answer of Wolfe is founded upon the neglect of this defendant to state in his answer whether he was the son-in-law of his co-defendant Levy. The fact of relationship is not material to the relief sought by this bill against either of the defendants. But I agree with the vice chancellor that, in connection with the facts charged, it might not be unimportant as a circumstance to sustain the charge of fraud. The difficulty, however, in sustaining this exception is, that the relationship is stated in the bill by way of recital merely, and not as a positive allegation. And there is no interrogatory calling upon the defendant to answer as to

his relationship to Levy. Although a mere recital of a fact may perhaps be sufficient to justify an interrogatory calling upon the defendant to answer as to that fact, so that it may be used as evidence, yet I do not think he was called upon in this case without such an interrogatory, to admit or deny the fact recited. This exception should therefore have been disallowed. (See *Albretcht* v. *Sussmann*, 2 Ves. & Bea. 323.)

The matters of the third and fourth exceptions, to the answer of this defendant, appear to be very material to the establishment of the complainants' claims against him, for the moneys alleged to have been obtained from their bank by fraud and collusion. The defendant is particularly interrogated as to the matters of these exceptions; and the particular sums of money received by him from Levy, and the precise time at which each particular sum was received by him, appear to be material when taken in connection with other facts in the case. He must also answer, not only as to his knowledge of the fact of the money having been overdrawn from the bank, but as to his understanding, belief and reasons for supposing that the money had been thus obtained, and as to the time when that information was first received by him. These two exceptions were therefore properly allowed.

The fifth exception calls upon this defendant to answer whether he admitted, when under oath before the recorder, that he had received the sum of $4,300 of Levy, with a knowledge that the same had been overdrawn from the complainants' bank. By the preceding exception, the defendant was called upon to answer as to the fact of his knowledge of the overdrawing at the time he received the money from Levy. If, in answering that exception, he admits he had such knowledge, it cannot be material for the complainants to show that he made a similar admission on his examination before the recorder. On the contrary, if he denies that he had such knowledge, the complainants cannot compel him to answer whether he swore differently on the occasion alluded to: as that might subject him to a prosecution for perjury. The complainants must therefore confine themselves to the answer to the main fact; and this exception must be overruled, as one which the defendant may not answer with safety to himself. As the money was still in his hands at the time of his examination before the recorder, if he was then informed that it had been obtained from the bank, by Levy, illegally and improperly, it is perhaps not very material to inquire whether he

had any previous knowledge of the fact: as he could not afterwards pay it over to Levy, so as to deprive the complainants of their rights as against himself.

The sixth exception calls upon Wolfe to disclose what disposition was made of the money received by him from Levy, and what has become of that part of it which remained in his hands at the time of his examination before the recorder. This exception is evidently well taken; as the complainants are entitled to follow their money, so long as it can be traced and identified, into the hands of any person who has not actually received it for a valuable consideration without notice of their rights.

The order of the vice chancellor, which is appealed from by this defendant, must therefore be modified so as to conform to this decision. And as a majority of the exceptions to this answer are not allowed, the complainants are not entitled to the costs of the reference. And neither party is to have costs as against the other upon the exceptions taken to the master's report, or upon the hearing before the vice chancellor, or upon this appeal.

PRAYER FOR RELIEF.

Holden v. *Holden, 24 Ill. App. 106. (1887.)*

MORAN, P. J.:

The question is whether, under the facts stated in the bill, a case is made for equitable cognizance. It is contended that a court of equity has no jurisdiction to quiet title or remove a cloud upon the title to real estate, unless the complainant is in possession, or the land is unimproved or unoccupied. Such is no doubt the general rule, but there are well recognized exceptions.

Where a complainant is seeking to remove a cloud which is in the nature of a legal title, which is being or may be asserted adversely to the title which he desires to protect, then he must show that he is in possession and therefore can not bring ejectment, or must allege and prove that the real estate whose title is clouded, is vacant or unimproved and unoccupied land. But when the facts stated in the bill show that the legal title claimed by the complainant is not disputed by the defendant in possession, but that such defendant sets up some equity not affecting the legal right of possession, but

which operates as a cloud on the legal title and prevents a sale of the property, or renders the title unmarketable, then equity has jurisdiction, because an action at law would not afford an adequate remedy, and in such case the possession by the defendant, in subordination to complainant's legal title, will not defeat the jurisdiction.

Taking the facts as alleged in the bill as true, it is very plain that complainant could maintain forcible detainer or ejectment upon the contract, and that defendant could not set up in such suit at law in bar of plaintiff's right of possession, that the contract in fact constituted a mortgage. But a judgment at law would not silence defendant's claim that the contract was but a security for money and that he had a right of redemption, and thus after a successful action at law defendant's claim of an equitable right in the land would be as complete a cloud upon complainant's title as it is now with defendant in possession.

The chancery court has jurisdiction in such a case under the ancient head of equity, that the action at law furnished no adequate remedy, and such jurisdiction has been sustained by the Supreme Court in a case not distinguishable in principle from this case. *Shays* v. *Norton,* 48 Ill. 100.

And in cases where there is fraud as a ground of equitable jurisdiction, and removing the fraudulent instrument as a cloud is incidental to the general relief, even though the fraudulent title is in its nature a legal title, and the holder of such title is in possession, a court of chancery will have jurisdiction to remove the cloud. *Booth* v. *Wiley,* 102 Ill. 84.

It is well settled that when equity has jurisdiction for one purpose, it will go on and do complete justice between the parties, and will not send them to a court of law because part of the relief may be purely legal relief. So here the court would be authorized to put complainant in possession if upon a hearing he maintained the allegation of his bill as to the nature of the contract. *Green* v. *Spring,* 43 Ill. 280.

But there is also another ground of plain chancery jurisdiction. The contract set out is claimed by complainant in his bill to be, and on its face is, a contract for the sale of real estate, and defendant is shown to be in possession under the contract, and to be in default.

In such case the vendor may go in the first instance into a court of equity, and call on the purchaser to come forward and pay the

money due, or be forever thereafter foreclosed from setting up any claim against the land; and under some circumstances such is his only safe remedy. *Hansbrough* v. *Peck,* 5 Wall. 497; *Derickson* v. *Chicago South Branch Dock Co.,* 18 Ill. App. 531.

It is true complainant has specially prayed for entirely different relief, but it is for the court to determine from the material allegations of the bill and the proofs on the hearing, what relief he is entitled to, and to decree him the appropriate relief and thus terminate the suit, unless, to avoid taking the relief which he is found by the court to be entitled to, he voluntarily dismisses his bill.

There was in this bill the prayer for general relief, as follows: "That your orator may have such other and further relief in the premises as equity may require, and this court may deem just." Under this general prayer the court could grant the relief appropriate to the facts, although the bill was not framed with a view to getting such relief. If the facts stated entitled the complainant to a certain relief, it matters not that such statement of facts may have been made with the purpose and belief, on the part of the solicitor who drafted the bill, that the relief sought might flow from a different source of equitable jurisdiction. *McNairy* v. *Eastland,* 10 Yerg. 309; *Vansant* v. *Allmon,* 23 Ill. 30.

The dismissing of the bill in this case on motion was, in effect, sustaining a demurrer to the bill, and a demurrer can not be sustained on the ground that a party has prayed for the wrong relief where there is also a prayer for general relief, because at the hearing the complainant may ask at the bar for the proper specific relief. *Wilkinson* v. *Beal,* 4 Mod. 408; *Hopkins* v. *Snedaker,* 71 Ill. 449; *Curyea* v. *Berry,* 84 Ill. 600; *Stanley* v. *Valentine,* 79 Ill. 544; *Westcott* v. *Wicks,* 72 Ill. 524; *Crane* v. *Hutchinson,* 3 Ill. App. 30.

There was error, therefore, in dismissing the bill on the motion of the defendant for want of equity, or for want of jurisdiction, and the decree must therefore be reversed and the case remanded.

Reversed and remanded.

Prayer for Process.

Wright v. *Wright*, 8 *N. J. Eq. 143. (1849.)*

The Chancellor:

It is a bill for dower: this is the substantial relief prayed. The bill anticipates that a decree for divorce, obtained by the husband, in his lifetime, will be set up as a defence; and asks dower notwithstanding that decree; alleging that it was fraudulently procured, and setting out the facts on which the allegation of fraud is founded. The complainant might have filed her bill for dower saying nothing of the decree for divorce, and left that to come up in defence. But I see no objection to framing a bill as this is framed; and I think the defence should be by plea and answer, and not by demurrer. The grounds of demurrer, therefore, which go to the matter of the bill are not well taken. As to these, the demurrer will be overruled.

The want of prayer for process, and of signature of counsel, are defects which require amendment. As to these the demurrer is allowed.

Order accordingly.

Howe v. *Robins*, 36 *N. J. Eq. 19. (1882.)*

The Chancellor:

The bill is filed to follow trust funds which, it alleges, were invested by a trustee by malversation in property, the title to which he took in his own name, and which he, at his death, claimed to own as his individual estate. It prays for a decree establishing the rights of the *cestuis que trustent* in the premises, and incidentally for a discovery; also for a distribution of the fund and an injunction to protect it *pendente lite*. Various objections are made to the bill under the notice, some in the nature of a general and others of a special demurrer. The former are not well taken: the latter are. The prayer for process is fatally defective. While the bill prays for process against "the said defendants," without naming any person, it does not appear from

the other parts of the bill, with reasonable certainty, who are referred to as "the said defendants." The persons mentioned in the preceding part of the bill as the defendants, are the heirs of the trustee alone—his children. His executrix and his widow have both been subpœnaed to answer, but there is no prayer for process against either of them. They are necessary parties, and so are the other persons interested with the complainant as distributees of the fund which the suit is brought to recover, and of which the bill prays distribution. The complainant will have leave to amend on payment of costs.

NOTE.—Defendants must be specially named in the bill, and process prayed against them. None are parties against whom process is not prayed, *Windsor* v. *Windsor*, 2 Dick. 707; *Fawkes* v. *Pratt*, 1 P. Wms. 592; *Elmendorf* v. *Delancey*, Hopk. 555; *Talmage* v. *Pell*, 9 Paige, 413; *Bondurant* v. *Sibley*, 37 Ala. 565; *Bond* v. *Hendricks*, 1 A. K. Marsh. 592; *Huston* v. *McClarty*, 3 Litt. 274; see *Ferguson* v. *Hass*, Phil. (N. C.) Eq. 113; unless out of the jurisdiction, *Haddock* v. *Tomlinson*, 2 S. & S. 219; *Erwin* v. *Ferguson*, 5 Ala. 158; see *Brooks* v. *Burt*, 1 Beav. 109; *Lucas* v. *Bank*, 1 Stew. (Ala.) 280; or an infant heir whose name is unknown, *Preston* v. *Dunn*, 25 Ala. 507; *Botsford* v. *O'Conner*, 57 Ill. 72; *Kirkham* v. *Justice*, 17 Ill. 107.

A prayer that, in a certain contingency, which has not happened, another person be made a defendant, does not make him a party, *Doherty* v. *Stevenson*, 1 Tenn. Ch. 518; see *Valentine* v. *Fish*, 45 Ill. 462.

The character in which defendant is sued must also appear in the prayer, *Carter* v. *Ingraham*, 43 Ala. 78; *Brasher* v. *Van Cortlandt*, 2 Johns. Ch. 242; *Lawson* v. *Kolbenson*, 61 Ill. 405.

The following cases show what has been held a sufficient designation of the defendant in the prayer for process: Where several stockholders, including the objecting defendant, were mentioned by name, and that the subpœna be directed "to the aforesaid stockholders hereinbefore mentioned and stated," *Carey* v. *Hillhouse*, 5 Ga. 251; where a grantor left many children, all of whom are dead but the defendants A, B and C, and process prayed against the defendants, *Williams* v. *Burnett*, Busb. Eq. 209.

The following were deemed insufficient: "That the clerk be ordered to issue subpœnas to the proper defendants," *Hoyle* v. *Moore*, 4 Ired. Eq. 175; where a corporation was defendant, and the process was prayed against its president and directors, *Verplanck* v. *Mercantile Ins. Co.*, 2 Paige 438, 1 Edw. Ch. 84; *Walker* v. *Hallett*, 1 Ala. 379.

Objection may be raised by demurrer, *Wright* v. *Wright*, 4 Hal. Ch. 143; *Archibald* v. *Means*, 5 Ired. Eq. 230; *Palmer* v. *Stevens*, 100 Mass. 461; see *Boon* v. *Pierpont*, 1 Stew. Eq. 7; *Ferguson* v. *Hass*, Phil. (N. C.) Eq. 113; but is waived by the defendant appearing and answering, *Seger* v. *Thomas*, 3 Blatchf. 11; *Airs* v. *Billops*, 4 Jones Eq. 17; *Belknap* v. *Stone*, 1 Allen, 572; or appearing and allowing a decree *pro confesso* to be taken, *Brasher* v. *Van Cortlandt*, 2 Johns. Ch. 242.—REP.

Carter v. *Ingraham, 43 Ala. 78. (1869.)*

PECK, C. J.:

This case originated in the chancery court of Lawrence county. The case appears to have been conducted, in that court, with great carelessness and irregularity, from the beginning to the end; and the transcript is miserably made up, with little or no regard as to the order of time when the different parts of the proceedings in the case were had.

The bill was filed by the appellee, Moses Ingraham, against the appellants, as the heirs at law of Joel W. J. Carter, deceased, the children and grand children of the said Joel W. J. Carter, ten in number, four of whom are infants under the age of twenty-one years, two under, and two over fourteen years.

The bill states that complainant, in the year 1860, recovered a judgment in the circuit court of said county, against the said Joel W. J. Carter, and one Malachi A. Carter, for the sum of fourteen hundred and fifty dollars, debt, and eighty-six dollars, damages, and costs of suit; that in 1864, the said Malachi A. Carter departed this life, wholly insolvent; that the said Joel W. J. Carter, in the year 1862, departed this life, at his residence, in said county of Lawrence, leaving his last will and testament, which was *admitted to record* in the office of the probate court of said county, but it does not state the said last will and testament *was proved.* The bill further states, that by said will, the said Ichabod W. Carter, and one L. H. Carter were appointed executors; that shortly afterwards, the said L. H. Carter died, leaving the said Ichabod W. Carter the sole surviving executor; that both of said executors qualified as such. It further states, that the said Joel W. J. Carter, was the owner, and was seized and possessed at the time the said judgment was rendered, of certain lands, and died seized and possessed of the same, lying and being in the said county of Lawrence; the lands are described. The bill then states the names of the heirs-at-law, the said Ichabod W. Carter being one.

The bill also states that an execution was duly issued upon said judgment, and afterwards *alias and pluries* executions were issued, but it does not state when they were issued; that neither of them were satisfied, either in whole or part, and that said judgment

remains wholly unpaid. He makes a transcript of said judgment and execution, an exhibit to his bill, by which it appears that the first execution was issued the 20th of March, 1866, but the exhibit does not show that it ever went into the sheriff's hands, nor does it show that any other execution was issued. The object of the bill is to set up and enforce an alleged lien, under this judgment, against said lands, for the purpose of satisfying the same; although the bill indirectly states that said Ichabod W. Carter is executor, &c., and also one of the heirs-at-law, it only prays process against him as an individual. Process is prayed against the other heirs-at-law, and they are all made defendants; the bill prays that guardians *ad litem* may be appointed for the infants; that the judgment may be decreed to be a lien on said lands, and that they may be sold for the payment of the same. The bill is not sworn to. A guardian *ad litem* was appointed for the said infants, but without an affidavit as to the fact of infancy, or that the infants were believed to be under, or over fourteen years of age.

It appears, in the proceedings, that two summons were issued, one to the defendants, who are of age, and the other to the infant defendants, and they are both returned by the sheriff, "executed in full, November 13th, 1866," without stating, in any manner, how they were executed. The 20th rule of chancery practice prescribes how summons issued against infants may be served. By this rule they may be served upon their parents, or either of them, if in life, or in case they are dead, upon the general guardian of such infants. When there is no parent or guardian, or the interest of the parent, or parents, or the guardian, is adverse to the infants, if they are over fourteen years of age, then the service must be upon said infants personally; and if the infants are under the age of fourteen, then the service must be upon such person or persons as may have the *maintenance and charge* of such infants, unless opposed in interest; and if there is any case not provided for by statute, or by said rule, or some other rule, and proof be made before the chancellor or register, he may direct the mode of service, or appoint a guardian *ad litem* for such infants, without service. It may be stated here that the bill does not say whether there were any parents, or general guardian, nor does it state who, if any person, had the maintenance or charge of the said infants.

The summons against the defendants of age, is against the said Ichabod W. Carter, as executor, and as heir-at-law. The bill, how-

ever, gave the register no authority to issue it against him as executor, because no process is prayed against him in that character, and besides, he answered the bill as heir-at-law, or as Ichabod W. Carter merely, and not as executor. In his answer this defendant admits substantially all the statements in the bill, but denies the lien, and says there is no equity in the bill, and states that he demurs to the bill, but does not show any reasons why he demurred. Section 3350, Revised Code, says, "a defendant to a bill must set forth the ground of demurrer specially, or otherwise must not be heard." A decree *pro confesso* was taken against the other defendants of age. The guardian *ad litem,* so irregularly appointed, answered the bill, and says he knows nothing of the truth of the allegations of the bill.

There was no evidence by depositions taken in the case, and it was submitted (the demurrer of the said Ichabod W. Carter to the bill of complaint having been overruled), upon the bill, answer of said Ichabod W. Carter, answer of the guardian *ad litem,* exhibit to the bill, and the decree *pro confesso* entered against the defendants of age, who had not answered the bill. A decree was rendered by which it is declared, that the said judgment is a lien on the lands described in the bill, and unless the amount due on the said judgment be paid in thirty days after the adjournment of the court, the register should proceed to sell the said lands, and report to the next term of the court.

The money not being paid, the register sold the lands, and they were bought by the appellee, and one Crittenden; the master made his report to the court at the next term; the report was confirmed, and it was ordered, adjudged and decreed, that the register make deeds to the purchasers and put them in possession of the lands.

The defendants have appealed to this court, and assigned several errors in the decree of the court below. It is, for the purpose of this opinion, only necessary to notice the assignment, that brings to the attention of this court, the appointment of the guardian *ad litem* for the infant defendants. The appointment of the guardian *ad litem,* without complying with the said 23d rule of chancery practice, is an error, for which the decree must be reversed, on the authority of *Rhett and Wife et al.* v. *Mastin, Trustee,* decided at this term. The appellee's counsel insists that the executor, the said Ichabod W. Carter only, is a necessary party defendant in this case, and as he admits all the important allega-

tions of the bill, the decree should be permitted to stand, as to him, in his character as executor. He says, "the only error in the decree, was in not dismissing the bill as to all the defendants except the executor," and that this court should correct this error, by dismissing the bill as to the other defendants, and affirming the decree, thus corrected, against the executor. This can not be done, for the reason that the bill is not sufficient to authorize any decree against the said Ichabod W. Carter as executor. The bill does not state that the will was proved, but only, that it was recorded in the probate court. This is not sufficient; it should have stated that the will was proved. Stating that the will was recorded, is not equivalent to stating that it was proved; besides, no process is prayed against him as executor; true, the summons, in the nature of a subpœna, was issued against him as heir-at-law, and as executor, but this does not help the matter, as the register had no authority to issue such a summons; he should have followed the prayer of the bill. Nor does the answer filed by him, cure this defect, for he does not answer as executor, but as Ichabod W. Carter merely. He is, therefore, not a party defendant to the bill in such manner as to authorize any decree against him in that character.

The bill is full of defects and infirmities, and the subsequent proceedings are full of irregularities, but under our liberal laws on the subject of amendments, it is possible the bill may be so amended as to make out a good case for the complainant; and that he may do so, if it can be done, the case will be remanded for that purpose.

The demurrer to the bill of complaint was rightly overruled, because no grounds of demurrer are stated, as required by said section 3350 of the Revised Code; but if proper grounds of demurrer had been stated in the answer, then the demurrer should have been sustained; for the bill, as it is, is clearly insufficient. The decree is clearly erroneous, not merely because of the error in the appointment of the guardian *ad litem* for the infant defendants, but because there is no evidence to sustain it, especially as to them. The admissions in the answer of the said Ichabod W. Carter, is no evidence against the infants, nor is the decree *pro confesso* against the other defendants; in fact, there is no evidence whatever against them.

It is deemed unnecessary to pursue this investigation further;

the decree of the court below is reversed, with all the proceedings back to the bill of complaint, at the costs of the appellee, with leave to the complainant to amend his said bill as he may be advised.

PETERS, J., not sitting in this case, having been of counsel.

SIGNING THE BILL.

Martin v. *Palmer*, 72 Vt. 409. (1900.)

CHANCERY. Heard on bill and motion to dismiss, Orange County, December Term, 1899, Munson, Chancellor. Decree rendered dismissing the bill. The orator appealed. The appeal was filed as of course.

WATSON, J.:

The bill of complaint was brought to foreclose a mortgage, and it was signed by the orators' solicitor, but not by the orators. The defendant moved to dismiss the bill for that there was no signature of the orators thereto. The motion was granted, and the cause is here upon appeal therefrom.

The bill is usually drawn by the orators' solicitor, and he is responsible for its contents. If it contains matter criminal, impertinent, or scandalous, such matter may be expunged, and the solicitor ordered to pay costs; and, from an early time, the general rule of practice has been imperative that the signature of counsel must be subscribed thereto.

It was declared by Lord Eldon that such signature of counsel is to be regarded as a security that, judging from written instructions laid before him of the case of the defendant as well as of the plaintiff, there appeared to him, at the time of framing the bill, good ground of suit. Mit. & Ty. Eq. Pl. & Pr. 145; 1 Dan. Ch. Pl. & Pr. 357. And so it is regarded under the chancery practice in this State (Chancery Rule 8), and in the Federal Courts. Equity Rule 24.

A party may sue in person and so be his own solicitor, in which event only, the practice requires that his signature be subscribed to the bill. 1 Hoff. Ch. Pr. 97.

The decree was not for the foreclosure of a mortgage, and,

therefore, the orators could take an appeal without permission of the court therefor. V. S. 981.

Decree reversed, and cause remanded with mandate that the motion to dismiss be overruled, and bill adjudged sufficient.

CERTAINTY IN PLEADING.

Dovaston v. *Payne, 2 H. Blackstone 527. (1795.)*

REPLEVIN for taking the cattle of the plaintiff. Avowry, that the defendant was seised in fee of the *locus in quo,* and took the cattle damage feasant. Plea, that the *locus in quo* "lay contiguous and next adjoining to a certain common and publick king's highway, and that the defendant and all other owners, tenants and occupiers of the said place in which &c. with the appurtenances, for the time being, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and the said defendant still of right ought to repair and amend the hedges and fences between the said place in which &c. and the said highway, when and so often as need or occasion hath been or required, or shall or may be required to prevent cattle *being in the said highway* from erring and escaping thereout into the said place in which &c. through the defects and defaults of the said hedges and fences, and doing damage there. And because the said hedges and fences between the said place in which &c. and the said highway, before and at the time when &c. were ruinous, broken down prostrated and in great decay for want of needful and necessary repairing and amending thereof, the said cattle in the said declaration mentioned just before the said time when &c. *being in the said highway* erred and escaped thereout, into the said place in which &c. through the defects and defaults &c. &c." To this plea there was a special demurrer, For that it is not shewn in or by the said plea, that the said cattle before the said time when &c. when they escaped out of the said highway into the said place in which &c. *were passing through and along the said highway,* nor that they had any *right to be there* at all, &c."

The support of the demurrer Williams, Serjt. argued as follows:

It is a rule in pleading, that if the defendant admits the fact complained of he must shew some good reason for or justification of it. If the cattle in this case had escaped from an adjoining close through the default of the plaintiff's fences, the defendant must have shewn that he had an interest in that close, or a licence from the owner to put his cattle there; Dyer, 365. *a.* Sir F. Leke's case, recognized Hob. 104. *Digby* v. *Fitzherbert;* for a man is bound to repair against those who have right, but not against those who have no right. So if cattle escape from a highway, the party justifying a trespass must shew they were lawfully along the highway, that is, were passing and repassing on it, which is material and traversable. It is not sufficient that they were simply in it, the *being* there is equivocal and not traversable. The owner of the soil may have trespass, if the cattle do any thing but merely pass and repass, Bro. Abr. Tresp. pl. 321, and according to this principle the entries state in pleas of this kind, that the cattle were *super viam prædictam transseuntes.* Thomp. Entr. 296, 397, and in Herne's Plead. 822 that they were *"driven along the highway."*

Heywood, Serjt, *contrà.* The same strictness is not required in a plea in bar to an avowry in replevin, as in a justification in trespass. Here the plaintiff pleads the plea, and it is sufficient for him to shew that his cattle were wrongfully taken. The *passing* on the highway is as uncertain as the *being* there, and as little traversable. But the material issues on the record would be, whether the fences were out of repair, and whether the defendant was bound to repair them. If he were, it is immaterial whether the cattle were passing on the highway or not. In a plea in bar certainty to a common intent is sufficient. It may therefore be intended that the cattle were lawfully in the highway.

Lord Ch. J. EYRE:

I agree with my brother Williams as to the general law, that the party who would take advantage of fences being out of repair, as an excuse for his cattle escaping from a way into the land of another, must shew that he was lawfully using the easement when the cattle so escaped. This therefore reduces the case to a single point, namely, Whether it does not appear on the plea, to a *common intent*, that the cattle were on the highway using it in such a manner as the owner had a right to do, from the words

"being in the said highway?" This is a different case from cattle escaping from a close, where it is necessary to shew that the owner had a right to put them there, because a highway being for the use of the public, cattle may be in the highway of common right; I doubt therefore whether it requires a more particular statement. It would certainly have been more formal, to have said that the cattle were passing and repassing, and if the evidence had proved that they were grazing on the way, though the issue would have been literally, it would not have been substantially proved. But I doubt whether the being in the highway might not have been traversed, and if the *being* in the highway can be construed to be certain to a common intent, the plea may be supported, notwithstanding there is a special demurrer, for a special demurrer does not reach a mere literal expression. The precedents indeed seem to make it necessary to state that the cattle were passing and repassing, but they are but few; yet upon the whole, I rather think the objection a good one, because those forms of pleading are as cited by my brother Williams.

BULLER, J.:

This is so plain a case, that it is difficult to make it a ground of argument. But my brother Heywood says, there is a difference between trespass and replevin in the rules of pleading. In some cases there is certainly a material difference in the pleading in the two actions, though in others they are the same. One of the cases in which they differ, is that if trespass be brought for taking cattle which were distrained damage feasant, it is sufficient for the defendant to say that he was possessed of the close, and the cattle were doing damage: but in replevin the avowant must deduce a title to the close. Wherever there is a difference, it is in favour of trespass and against replevin: for in trespass an excuse in a plea is sufficient, but in an avowry a title must be shewn. This brings me to the question, Whether the plea on this record be good to a common intent? Now I think that the doctrine of certainty to a common intent will not support it. Certainty in pleading has been stated by Lord Coke (Co. Litt. 303) to be of three sorts, viz. certainty to a common intent, to a certain intent in general, and to a certain intent in every particular. I remember to have heard Mr. Justice Afton treat these distinctions as a jargon of words, without meaning. They have however long been made, and ought

not altogether to be departed from. Concerning the two last kinds of certainty it is not necessary to say any thing at present. But it should be remembered, that the certain intent in every particular applies only to the case of estoppels (Co. Litt. *ibid.*). By a *common intent* I understand that when words are used, *which will bear a natural sense,* and also *an artificial one,* or one to be made out by argument or inference, the *natural sense shall prevail:* it is simply a rule of *construction* and *not of addition:* common intent cannot add to a sentence words which are omitted. There is also another rule in pleading, which is, that if the meaning of words be equivocal, they shall be taken most strongly against the party pleading them. There can be no doubt that the passing and repassing on the highway was traversable; for the question, Whether the plaintiff was a trespasser or not? depends on the fact whether he was passing and repassing and using the road as a highway, or whether his cattle were in the road as trespassers; and that which is the gist of the defence must necessarily be traversable. A most material point therefore is omitted, and I think the plea would be bad on a general demurrer. But here there is a special demurrer, and as the words are equivocal they are informal.

HEATH, J.:

The law is as my brother Williams stated, that if cattle of one man escape into the land of another, it is no excuse that the fences were out of repair, if they were trespassers in the place from whence they came. If it be a close, the owner of the cattle must shew an interest or a right to put them there. If it be a way, he must shew that he was lawfully using the way; for the property is in the owner of the soil, subject to an easement for the benefit of the public. On this plea it does not appear whether the cattle were passing and repassing, or whether they were trespassing on the highway; the words used are entirely equivocal.

ROOKE, J. of the same opinion.

Judgment for the defendant.

Hartwell v. *Blocker, 6 Ala. 581. (1844.)*

WRIT of error to the Court of Chancery sitting at Mobile.

On the 27th of February, 1843, the defendant in error filed his bill, setting forth that on the eighteenth of August, 1836, Eleazer Hartwell and John Hartwell were indebted to Abner S. Lipscomb and George W. Owen, since deceased, in the sum of sixteen hundred and five dollars, by six promissory notes (particularly described), for different sums, payable at different times at the Planters' and Merchants' Bank of Mobile. In order to secure the payment of these several notes, Eleazar and John Hartwell conveyed five tracts of land situate in Mobile county, containing ten acres each; conditioned that the same should be void if the notes should be paid according to their tenor and effect. The bill alleges, that the notes are due and unpaid; and recites, that the complainant is the assignee of Abner S. Lipscomb and Louisa S. Owen, the administratrix of George W. Owen, deceased; and that Eleazar Hartwell, by deed bearing date the 26th of July, 1838, conveyed his interest in the lands in question to John Hartwell.

John Hartwell and Josiah Wilkins, who, it is alleged, holds under him, are made defendants. The bill concludes with a prayer than an account may be taken, the equity of redemption in the mortgaged premises foreclosed, and the lands sold, &c. Further, that process of subpœna may issue, &c.

Subpœna issued on the 1st March, 1843, was executed on Wilkins on the 2d, and on Hartwell on the 3d of the same month; and on 4th of April thereafter, a decree *pro confesso* was entered against the defendants. Thereupon, the notes and mortgage, being produced and proved to the court, were, with the bill, referred to the master to ascertain the amount due and owing to the complainants; and report accordingly at the then term of the court. The master reported, "that on examination of the mortgage, bill and notes, he finds due as follows, to wit: on the 18th August, 1837, a note for $356 34; on the 18th February, 1838, a note for $368 34; with interest on the said notes from the times when they respectively fell due."

On the 11th of April, 1843, during the same term, a motion

was made for the confirmation of the report and a decree for the sale of the mortgaged premises. Thereupon, reciting that it was shown to the court, that the parties have had two days' notice of the contents of the report; that no exceptions were filed, and no objection made, it was decreed that the report be in all things confirmed; that the defendants pay into the hands of the register, within sixty days, the amount reported due, with interest and costs of suit: in default thereof, the master proceed to sell the property described in complainant's bill and mortgage, or so much thereof as may be necessary to satisfy the decree, in separate parcels or entire, as may best promote the defendant's interest, at public auction, in front of the courthouse of Mobile county, under the same rules and regulations that govern sheriffs in making sales of like property under execution. Further, that he give public notice once a week for thirty days previous thereto, by publication in some newspaper printed in the city of Mobile; and also, by posting notice on the door of the courthouse of the county. The master was directed to report his proceedings to the next term of the court.

At a further day of the same term, the defendants moved to set aside the report and order of reference, on the ground that Eleazar Hartwell had not been made party to the suit. But the chancellor was of opinion, that as he had made an absolute assignment of his interest in the mortgaged property, there was no necessity for making him a party; and accordingly he overruled the motion.

COLLIER, C. J.:

It was said by Lord Hardwicke, that in pleading, "there must be the same strictness in equity as at law." (2 Atk. Rep. 632.) But Mr. Justice Story says, "however true this may be as to a plea in equity, technically so called, it can hardly be affirmed to be true in the framing of bills or answers, in respect to which more liberality prevails. And it may, perhaps, be correctly affirmed, that certainty to a common intent is the most that the rules of equity ordinarily require in pleadings for any purpose." (Eq. Plead. 206.)

Uncertainty in a bill, it is said, may arise in various ways: 1. In the case intended to be made by the bill. 2. Though the case intended to be made be certain, yet the allegations of the bill may be vague and general. 3. Some of the material facts may be

stated with sufficient certainty, and others again with so much indistinctness or incompleteness as to their nature, extent, date, or other essential requisites, as to render inefficient those with which they are connected, or upon which they depend. (Story's Eq. Plead. 207, *et post,* and cases there cited.) In *Cresset* v. *Milton* (1 Ves. jr. Rep. 449), the bill was brought to perpetuate a right of common and way; the allegation was, that the tenants, owners and occupiers of certain lands of a manor, "*in right thereof or otherwise,*" from, &c., had and of right ought to have common of pasture, &c. The bill was held bad on demurrer; for "it was not set forth as common appendant, or as common appurtenant, but as that, "or otherwise," which was no specification at all, and left any sort of right open to proof. So, in *Jones* v. *Jones* (3 Meriv. Rep. 160), which was a bill by an heir at law to restrain the defendant from setting up an outstanding term, &c.; but as there was no averment of any outstanding terms, it was held bad on demurrer. And where a bill sought a general account upon a charge of fraud, it is not sufficient to make such charge in general terms; but it should point out particular acts of fraud. (*Palmer* v. *Mure,* 2 Dick. Rep. 489.) But the complainant is not bound to state *all the minute facts;* the general statement of *a precise fact* is usually sufficient. The circumstances which confirm or establish it, more properly constitute matters of proof than of allegation. (Story's Eq. Plead. 212.)

In the present case, the complainant describes himself as the assignee of A. S. Lipscomb and the administratrix of G. W. Owen, deceased; and after describing the date, and amount intended to be secured by a mortgage to L. and the intestate, the bill continues, "whose interest has been legally transferred and assigned over unto your orator, that certain part or parcel, situate," &c. (here follows a description of the mortgaged premises). The notes are described as bearing even date with the mortgage, payable some of them to the order of the defendant Wilkins, the others to the order of the makers; and all of them for unequal sums, payable and negotiable at the Planters' and Merchants' Bank of Mobile. It is charged, that although the notes have since been due and payable, yet the mortgagors have failed and refused to pay the same, "whereby the legal estate to the said premises has become absolute in your orator." In all this, there is no allegation that the complainant is the assignee of the notes, or

either of them; the inference that such is the fact, is not necessary and direct. It may or may not be so. If the terms in which the case is attempted to be stated, are to be understood as having been employed according to their appropriate use, and with their usual meaning, they rather show that the complainant is the assignee of the mortgage than the notes. And it is not only not alleged that the complainant was the assignee of all the notes, but it is not stated that if either or any of them was assigned to him, which it is.

It may be true, that the mortgage may have been assigned to the complainant by the mortgagees, yet this would not authorize him to file a bill for a foreclosure. In *Doe ex dem. Duval's heirs* v. *McLoskey* (1 Ala. Rep. N. S. 708), it was determined, that a mortgagee cannot assign the right to the mortgaged property without also assigning the debt to which it is an incident, yet it seems he may relinquish, *by contract,* the possession of the mortgaged premises to a third person until the debt is paid.

Without amplifying the point, it sufficiently appears from what has been said, that the bill is obnoxious to the objection of uncertainty. That even if the case intended to be made by the bill is certain, the allegations are too vague and general to authorize a court of equity to entertain it.

Although some of the notes are payable to the order of the makers, and do not, upon their face, import a promise to pay any one, yet the mortgage is an acknowledgment that they were the property of the mortgagees—that the mortgagors were bound to pay them; and in order to their security, conveys the land described in it. This is quite sufficient to show, that the notes have been transferred by the maker, whether by writing, or mere delivery is wholly immaterial in the present case. True, in order to maintain an action at law upon them, the plaintiff should show a regular transfer; but it is competent for the holder to entertain a suit in equity, though they were transferred by delivery only.

The bill should state of which of the notes the complainant is the proprietor; if any one of them maturing before those he holds is paid, or outstanding, unpaid, the fact should be stated, and the holder made a party. In respect to subsequent incumbrancers, although they are proper, yet they are not indispensable parties. (*Judson* v. *Emanuel, et al.* 1 Ala. Rep. N. S. 598; *Cullum, et al.* v. *Batre's ex'rs,* 2 Ala. Rep. 415.)

In respect to the other questions made by the plaintiffs in error, it is unnecessary now to consider them. They are mere questions of practice, about which it is not probable that any controversy will arise in the ulterior progress of the cause; especially if the decisions we have heretofore made touching the interest of surviving payees, the powers of executors and administrators, parties in equity, the registration of deeds, and the duties of masters in chancery, are consulted.

It follows from what has been said, that the decree of the court of chancery must be reversed, and the cause remanded. But inasmuch as no objection to the frame of the bill was taken in the primary court, the defendant in error will not be taxed with the entire costs; each party will pay their own costs in this court.

Hood v. *Inman*, 4 Johns. Ch. (N. Y.) 437. (1820.)

EXCEPTIONS to the defendant's answer: 1. That the answer sets forth, *in hæc verba,* a copy of the power of attorney from the plaintiff to the defendant and William Lang, mentioned in the bill, though the defendant was not requested so to do, and though the substance of the power was fully stated in the bill, and when, by setting it forth *in hæc verba,* the sense and legal effect of it are not, in the least, qualified or varied from the same instrument as set forth in the bill.

2. Because the defendant has, in his answer, from a part of the 17th page thereof, to a part of the 19th page thereof, beginning, &c. stated matters not necessary to answer any allegations in the bill, to which he is not interrogated, and upon which no pertinent interrogatories can be framed, or depositions given, and which are totally irrelevant, immaterial, and highly scandalous.

The exceptions, having been referred to a master, were allowed by him, and the defendant excepted to his *report.* And the question now came upon the exceptions to the report.

THE CHANCELLOR:

1. It was not necessary to set forth the power of attorney *in hæc verba,* in the answer. The substance of it was accurately stated in the bill, and to give it at length in the answer, was impertinent. Impertinence consists (1 Harr. Pr. 101. 303) in setting forth what

is not necessary to be set forth, as where the pleadings are stuffed with long recitals, or with long digressions of matters of fact which are totally immaterial. An answer, or a bill, ought not, ordinarily, to set forth deeds *in hæc verba;* and if the pleader sets forth only so much thereof as is material to the point in question, it is sufficient. They are matter of evidence to be shown at large at the hearing. In *Alsager* v. *Johnson* (4 Ves. 217) a bill of costs was given at large in the schedule to the answer, when a reference to the bill of costs delivered would have fully answered the purpose, and it was deemed impertinent. The present is not an instance of gross abuse of this rule of pleading; but I am glad to see the exception taken, and the point brought up, for the opportunity it affords of laying down the rule. I have frequently perceived the pleadings, and particularly the bill, encumbered with a recital, *in hæc verba,* of deeds, mortgages, and other documents, which, unless checked, will lead to great oppression of the suitor, and to the reproach of the Court. Whenever a proper case arises, I shall certainly mark it with animadversion; and shall endeavor to enforce, by all suitable means, precision and brevity in pleading. The objection to unnecessary *folia,* may be taken on the taxation of costs.

The ancient rules and orders of the English Court of Chancery, are very explicit, and powerfully monitory on this subject.

If any pleading should be found of an immoderate length, Lord Bacon declared, that both the party and the counsel, under whose hand it passed, should be fined. And Lord Keeper Coventry, with the advice of Sir Julius Cæsar, the master of the rolls, in 1635, ordained, that bills, answers, &c., "should not be stuffed with the repetitions of deeds or writings *in hæc verba,* but the effect and substance of so much of them only as was pertinent and material to be set down, and that in brief and effectual terms, &c., and upon any default therein, the party and counsel, under whose hand it passed, should pay the charge of the copy, and be further punished as the case should merit."

The same rule was, afterwards, adopted, or re-enacted, by the lords commissioners in 1649, and in Lord Clarendon's Digest or System of Rules (Beame's Orders, 25, 69, 165).

But we have a domestic precedent on this point, which is too interesting to be unnoticed.

In 1727, Governor Burnet, of the colony of New York, exercising, *in council,* the powers of a Court of chancery, appointed five

of the most distinguished counsel of the Court, as a committee, "to consider and report on the fees and dilatory proceedings in the Court of Chancery, as true and great grievances." This committee, consisting of Archibald Kennedy, Rip Van Dam, Cadwallader Colden, James Alexander, and Abraham Van Horn, reported to the counsel a number of abuses in the practice of the Court of Chancery, and the remedy. This report, which is inserted at the end of Bradford's edition of the Colony Laws, is a curious and instructive document; but my concern, at present, is only with what is termed the first abuse and remedy. It declares, "as an abuse, the inserting, at too much length, in bills, matters of inducement only. Thus, if A. has been entitled to the thing in question, who conveyed it to B., who conveyed it to C., who conveyed it to the plaintiff; after the thing is certainly set forth in A., it is enough to say, he conveyed it to B., and he to C., and he to the plaintiff, as, by the deeds ready to be produced, will appear." *No counsel,* say they, *ought to set their hands to any bill that is unduly long,* and if he does, he ought to pay all the charges arising from such needless length.

The exception to the master's report, allowing this first exception, is overruled.

2. The same objection applies to the matter forming the ground of the second exception. It was matter argumentative, rhetorical, irrelative, and, consequently, impertinent. Pleadings should consist of averment, or allegations of fact, and not of inference and argument.

The exception to the report is, also, overruled; and as the fault of the pleader was of a venial character, I am content that the costs of the exceptions, *in this particular case,* should abide the event of the suit.

Order accordingly.

CHAPTER IV.

PROCEEDINGS ON BEHALF OF PLAINTIFF.

Filing the Bill.

Bank v. *Hoyt, 74 Miss. 221. (1896.)*

From the chancery court of Lauerdale county.

Hon. N. C. Hill, Chancellor.

The opinion states the case.

Whitfield, J., delivered the opinion of the court.

The question which lies at the threshold in the decision of this case is whether the bill of appellant was filed, within the contemplation of law, on May 5, 1892. The facts are these: On May 5, 1892, appellant's counsel took the bill and the exhibits in one cover to the chancery clerk, and had him indorse on the bill the word "filed," etc., and the clerk made a corresponding entry in the general docket, and prepared a regular court wrapper, and put it around the papers. But counsel immediately took the bill and exhibits back to his office, telling the clerk that he did not wish process issued then, but not giving him any reason for not issuing process. The clerk charged the counsel with the papers in his attorney's docket. The bill was kept by counsel in his office until the ninth of May, when he returned the bill, and process was issued and served on the tenth. In the meantime, on May 7, 1892, counsel for appellees took their bill to the clerk of the chancery court, and it was filed on that day, and process issued and served that day. Said counsel had, on the fifth of May, gone to the clerk's office, to see what bill, if any, had been filed, and was told a bill had been filed by counsel for appellant, and was shown the entry on the general docket, and informed that the papers were at the office of appellant's counsel. These are all the facts bearing on this question.

The code of 1892, § 463, provides that the clerk "shall not suffer any paper so filed to be withdrawn but by leave of the chancellor, and then only by retaining a copy, to be made at the costs of the party obtaining the leave. All the papers and pleadings filed in

a cause shall be kept in the same file, and all the files kept in numerical order." In *Cooper* v. *Frierson,* 48 Miss. 310, in construing the clause under the agricultural lien law of 1867, "he must file the contract, or a copy thereof, in the clerk's office," the court said: "The statute is not satisfied by the indorsement on the contract that it was filed, if the creditor withdraws it, and keeps it. . . . The term 'filing' imports that the paper shall remain with the clerk as a record, subject to be inspected by those who have an interest in it, and to be certified by him as any other paper properly lodged in his office and committed to his custody. It is admitted that Frierson's contract was not, in this sense, 'filed' in the clerk's office. It follows, then, that he has no lien."

Anderson's Law Dictionary defines the noun "file" as follows: "At common law, a thread, string, or wire upon which writs or other exhibits are fastened for safe-keeping and ready reference." And the definitions of Webster's International Dictionary and the Century Dictionary are to the same effect. The verb Anderson thus defines: "To leave a paper with an officer for action or preservation"; and he adds: "In modern practice, the file is the manner adopted for preserving papers. The mode is immaterial. Such papers as are not for transcription into records are folded similarly, indorsed with a note or index of their contents, and tied up in a bundle—a file." Webster quotes Burrill, as follows: "To file a paper on the part of a party is to place it in the official custody of the clerk. To file on the part of the clerk is to indorse upon the paper the date of its reception, and retain it in his office, subject to inspection by whomsoever it may concern." Mr. Freeman, in a learned note to *Beebe* v. *Morrell* (Mich.), 15 Am. St. Rep. 295 (42 N. W. 1119), thus sums up: "Filing consists simply in placing the paper in the hands of the clerk, to be preserved and kept by him in his official custody as an archive or record, of which his office becomes thenceforward the only proper repository; and it is his duty, when the paper is thus placed in his custody, or filed with him, to indorse upon it the date of its reception, and retain it in his office, subject to inspection by whomsoever it may concern; and that is what is meant by filing the paper. But, when the law requires a party to file it, it simply means that he shall place it in the official custody of the clerk. This is all that is required of him; and, if the officer omits the duty of indorsing upon it the date of the filing, that will not prejudice the rights of the party.

This seems to be universal in its application to all documents, of whatever nature, which the law requires to be filed," citing many authorities, to the following among which we especially refer: *Holman* v. *Chevallier,* 14 Tex. 339; *Bishop* v. *Cook,* 13 Barb. 329; *Phillips* v. *Beene's Admr.* 38 Ala. 251.

In *Pfirmann* v. *Henkel,* 1 Ill. App. 145, cited in 7 Am. & Eng. Enc. L. (1st series), 962, the case was this: "A certificate and affidavit required to be filed under a limited partnership act, were sent by a messenger to the clerk's office, and there presented for the purpose of being filed. The deputy clerk, to whom they were presented, instead of retaining them, by mistake added a certificate of the official character of the notary before whom they were acknowledged, and returned them to the messenger, by whom they were carried away. Several months afterwards they were returned to the county clerk's office and properly filed. As against a creditor whose debt accrued before the papers were returned to the clerk's office, it was held that the first presentation of them did not constitute a filing. "Filing a paper," said the court, *"ex vi termini,* means placing and leaving it among the files. The memorandum indorsed by the officer in whose custody it is placed is merely evidence of the filing, and not the filing itself."

We close the citation of authorities with the result in modern practice, as stated by Mr. Freeman in the note above referred to (page 294, vol. 15, Am. St. Rep.): "The word 'file' is derived from the Latin *'filum,'* signifying a thread, and its present application is evidently drawn from the ancient practice of placing papers upon a thread or wire for safe-keeping. The origin of the term clearly indicates that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it upon the thread or wire; and accordingly, under the modern practice, the filing of a document is now generally understood to consist in placing it in the proper official custody by the party charged with the duty of filing it, and the receiving of it by the officer, to be kept on file. The most accurate definition of filing a paper is that it is its delivery to the proper officer, to be kept on file."

In *Christian* v. *O'Neal,* 46 Miss. 672 (a case of an attempt to enforce a mechanic's lien, in which, as in a chancery suit, the filing of the petition is the commencement of the suit), it was

said: "If a petition was not on file when this or the writ of June, 1861, was issued, suit was not begun."

We have quoted thus largely from the authorities, because the determination of this point will be decisive of the case. It is clear that marking the paper "filed" is not filing it. A paper may be marked filed, and yet not be in fact filed; and a paper may be in fact filed, though not marked filed. And the entry on the general docket does not constitute filing. All these indorsements of the clerk are evidence, but not conclusive evidence, of a filing. Whatever the nature of the paper, it can only be filed by delivering it to the proper officer, to be by him received and dealt with in the manner usual with the particular character of paper. If a deed, for example, or other paper required to be recorded, it must be kept by the clerk until recorded; if any paper, in respect to which a statute requires the original or a copy to be filed, the original may not be withdrawn till a copy has been filed. If a bill in chancery, it must be delivered to the clerk, to be by him received, indorsed, and dealt with in the manner usual with such bills. It must be delivered and recorded with the purpose of having process issue in due course. Suits in chancery begin, of course, from the filing of the bill, and at law from the issuance of process, under the code of 1857 (for present practice, see § 670, code of 1892); but just as, under code of 1857, at law, the suit is not begun, though process be issued, unless it is intended that it be served as in regular course (*Lamkin* v. *Nye,* 43 Miss. 252), so, in equity, the suit will not be begun unless the bill is delivered with the purpose that the usual steps shall be taken. In the one case, there is no issuance of process, and in the other, no filing of the bill, within the meaning of the law. Clearly, there was no such filing here. The error of counsel for appellant was in supposing that merely having the bill marked "filed," and placed in a court wrapper, or docketed, without more, and with the declared purpose that the process should not issue, would constitute filing, because of the rule that in chancery the suit is begun by the filing of the bill. But the filing meant, as we have shown, must be a filing in the legal sense, with the purpose that process and all usual steps shall follow in due course. *Lamkin* v. *Nye,* 43 Miss. 252, explains the principle. It it is not necessary to decide whether the provision in our statute against withdrawing papers (§ 463, code 1892) means to prohibit the taking out of a pleading by counsel for examination, except

on the terms named in the statute, or whether withdrawal means permanent withdrawal from the files.

It is doubtless true, as suggested by learned counsel, that it is the custom for attorneys to take out pleadings, giving their receipt, and usually no question would arise, as the instances are rare in which the priority of a lien is determined by the filing of a particular pleading. But we desire to be understood as deciding nothing on this precise point, resting our decision in this case on its own facts. We cannot hold that what was done with this bill constituted a filing of it, under the general rule as to the filing of pleadings, nor under the terms of this statute, without deciding that the mere marking upon a pleading of the word "filed," etc., and a docket entry thereof, and a placing momentarily of the bill in a court file, without more, in a cover, where it was at once handed back and taken away, and kept away until another bill had been filed regularly, with the direction not to issue process added, constitute filing; and this, manifestly, is in the face of all principle and of all the authorities. We have gone carefully through all the questions in the case, but it is unnecessary, in the view we have taken, to remark upon them.

Affirmed.

WHEN IS SUIT COMMENCED?

Clark v. *Slayton, 63 N. H. 402. (1885.)*

A suit in equity is not commenced until the bill is filed.

BILL IN EQUITY, to recover money verbally promised in support of a base-ball club. The defendant in his answer alleges that there is no equity in the bill, that the plaintiff has no adequate remedy at law, and sets up the statute of limitations.

In 1877 the plaintiff was the manager of a base-ball club in Manchester. He, the defendant, and three others, verbally agreed to pay each one sixth part of the excess of the expenses over the receipts of the club. The plaintiff, as manager, advanced the expenses, and at the end of the season, in the fall of 1877, demanded payment of the defendant of his share of the excess over the receipts, which the defendant refused to pay. About the first of June, 1883, the plaintiff drew the bill and sent it to the clerk, who

notified him that by the rule it could not be filed and entered until the entry fee was paid. February 12, 1884, the necessary fees having been provided, the bill was filed and an order of notice issued, which was served upon the defendant February 28, 1884. The court dismissed the bill, and the plaintiff excepted.

CARPENTER, J.:

An action at law is in general regarded as commenced, so as to avoid the statute of limitations, when the writ is completed with the purpose of making immediate service. But when there is no intention to have it served, or it cannot be served until some further act is done, the action is not deemed to be commenced until such act is performed. *Robinson* v. *Burleigh,* 5 N. H. 225; *Graves* v. *Ticknor,* 6 N. H. 537; *Hardy* v. *Corlis,* 21 N. H. 356; *Mason* v. *Cheney,* 47 N. H. 24; *Brewster* v. *Brewster,* 52 N. H. 60. The same rule is applicable to suits in equity. *Leach* v. *Noyes,* 45 N. H. 364. A bill in equity must be filed in the clerk's office, and an order of notice obtained, before it can be served upon the defendant. Rules 11, 13. The date of the filing is therefore the earliest time which can be taken as the commencement of the suit.

The plaintiff's action is barred by the statute of limitations. This result makes it unnecessary to consider other questions raised by the case.

Exceptions overruled.

ALLEN, J., did not sit; the others concurred.

United States v. *Am. Lumber Co., 85 Fed. Rep. 827. (1898.)*

Appeal from the Circuit Court of the United States for the Northern District of California.

GILBERT, Circuit Judge:

The United States brought a suit in equity against the American Lumber Company and the Central Trust Company to declare null and void certain patents issued by the United States for lands in California, the title to which is vested in the American Lumber Company, subject to the lien of a trust deed to the Central Trust Company, securing bonds of the former company to the amount of $300,000. The defendants pleaded in bar of the suit that by an

act of congress approved March 3, 1891 (26 Stat. 1093, § 8), it is provided that "suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act," and that the patents which it was the object of the suit to annul and vacate had been issued before the enactment of said statute, and that the suit had not been brought within five years from the passage of the act. The bill was filed on February 3, 1896, in the circuit court for the Northern district of California. It contained the allegation that the defendant the American Lumber Company is a corporation organized under the laws of the state of Illinois, and that the Central Trust Company is a corporation organized under the laws of the state of New York. On the day on which the bill was filed, two subpœnas bearing date February 3, 1896, were issued out of the clerk's office, upon a præcipe which reads as follows:

"To the Clerk of Said Court—Sir: Please issue two originals and two copies of subpœna ad respondendum herein, for service upon respondents, returnable March 2, 1896; one original and copy being necessary for service upon, and for marshal to make return of service upon, the respondent American Lumber Co., in Chicago, and the other original and copy of subpœna ad respondendum being necessary for marshal to serve upon, and to make return of service upon, the respondent Central Trust Co., in New York."

Both of the subpœnas so issued were sent as soon as issued, the one to the United States marshal for the Northern district of Illinois, and the other to the United States marshal for the Southern district of New York. The marshal for the Northern district of Illinois returned the subpœna with the indorsement that the defendants were not found within his district. A subpœna was again issued February 18, 1896, and was sent to said marshal, and was thereafter returned with the indorsement that on February 24, 1896, it had been served upon the secretary of the American Lumber Company, in that district. The marshal for the Southern district of New York served the subpœna on the Central Trust Company, in New York, on February 11, 1896. On March 5, 1896, and two days after the expiration of the five-years period of limitation for the commencement of the suit, an order was entered in the suit, reciting that it appeared from the affidavit of Benjamin F. Bergen, solicitor for the complainant, that the defendants were foreign corporations, having no officer or representative or agent,

nor any office or place of business, within the state of California, and that the defendants could not be found in said state, and had not voluntarily appeared in the suit, and requiring them to appear on April 6, 1896. A copy of this order was served on the American Lumber Company March 9, 1896, and on the Central Trust Company March 16, 1896. On June 22, 1896, the service of this order was quashed upon the motion of the defendants; and on June 25, 1896, another order was thereupon entered, containing recitals similar to those of the first order, and directing the defendants to appear on August 3, 1896. It was upon the service of this last order that the defendants appeared and filed the pleas of the statute of limitations above set forth. Upon the hearing before the circuit court, the pleas were sustained, and the bill was dismissed. The case upon appeal to this court presents the single question whether or not, upon the record above set forth, the suit was begun within five years after March 3, 1891.

Was the suit begun on or before March 3, 1896? It is contended by the appellant that by filing the bill in equity and causing process to be issued thereon, for both the defendants, in good faith, before that date, it took all the steps necessary to bring or commence the suit before the expiration of the time limited by the act of congress. Just at what point of time a suit in equity may be said to have been begun under the practice of the federal courts has not been determined by any statute, or by any rule of court, or by any authoritative decision. A solution of the question must be found by reference to the English chancery practice, which has been made the rule of procedure in those courts.

The origin of the English chancery practice is involved in some obscurity, but from the earliest treatises upon the subject it appears that the jurisdiction of the court of chancery was invoked formerly, as now, by filing a petition or bill setting forth the complainant's grounds for relief, and praying that a writ of subpœna issue. Upon the petition so presented, the chancellor determined whether a cause was made for the issuance of the writ. He had the power to grant or to withhold the writ. If the writ was granted, the suit was begun; otherwise, there was no suit. The issuance of the writ was the commencement of the suit. In Harg. Law Tracts, 321, 425, may be found treatises on the writ of subpœna, in which the suit in chancery is designated a suit by subpœna. In course of time the practice was modified so that the signature

of counsel for the complainant was taken as sufficient authority for the issuance of the writ, and it was no longer necessary for the chancellor to pass upon the case made in the petition. It was held that the suit was pending from the teste of the subpœna. *Pigott v. Nower,* 3 Swanst. 534. Such, in brief, was the English chancery practice at the time of its adoption as the rule of procedure in the courts of the United States. And while it is true that, in cases where the suit was instituted on behalf of the crown, the matter of complaint was presented to the court by way of information instead of by petition or bill, it was only in form that the information differed from a bill; and it appears that from the filing of the information the subsequent procedure was substantially the same as in other suits. Mitf. Ch. Pl. 7, 22, 119; *Attorney General v. Vernon,* 1 Vern. 277, 370. The present suit on behalf of the United States might, no doubt, have followed the procedure of the English courts upon information (1 Barb. Ch. Prac. 34); but no warrant would be found from that fact for departing from the ordinary course of a suit in equity. Our equity rule No. 7 follows the English statute (4 Anne, c. 16, § 22) in providing that "no process of subpœna shall issue from the clerk's office in any suit in equity until the bill is filed in the office." Rule 5 provides that while all motions for the issuance of mesne process in the clerk's office shall be grantable, of course, by the clerk of the court, "the same may be suspended or altered or rescinded by any judge of the court upon special cause shown." In the frame of the bill there is still inserted the prayer that the writ of subpœna may issue; but, under equity rule 24, signature of counsel is "an affirmation, upon his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit in the manner in which it is framed"; and it takes the place of an examination of the bill by the chancellor under the original practice. The writ of subpœna in the English chancery practice ran in the name of the king, and was returnable before the chancellor. Our writ is issued in the name of the president of the United States, and is returnable before the court in chancery. It has been the interpretation of the English chancery practice, as the same has been followed and applied by the American state courts, that a suit is begun, within the meaning of the statute of limitations, when the subpœna has been issued, provided that its issuance has been followed by a bona fide effort to serve the same.

In the case of *Hayden* v. *Bucklin,* 9 Paige, 512, Chancellor Walworth thus stated the law:

"At the present day the filing of a bill, and taking out a subpœna thereon, and making a bona fide attempt to serve it without delay, may be considered as the commencement of the suit for the purpose of preventing the operation of the statute of limitations, if the suit is afterwards prosecuted with due and reasonable diligence."

The language of the opinion so quoted is adopted as an authoritative formulation of the law in Busw. Lim. § 365, and in Ang. Lim. § 330.

In *Fitch* v. *Smith,* 10 Paige, 9, the chancellor again declared the rule:

"It is true, in common parlance we use the expression 'filing of the bill' to denote the commencement of a suit in chancery, instead of referring to the issuing and service of subpœna, or the making of a bona fide attempt to serve it after the bill has been filed, which is the actual commencement of the suit in this court."

In *Pindell* v. *Maydwell,* 7 B. Mon. 314, the supreme court of Kentucky said:

"In bringing a suit in chancery, the first step taken by the complainant is to file his petition or bill; and hence writers on this subject frequently speak in general terms of this act as the commencement of the suit. But, so far as it relates to the defendant, the suing out process against him is the commencement of the suit, preferring the bill being only preparatory to this being done."

Counsel for appellant rely upon the language of the court so quoted, and upon similar expressions of other courts, to sustain the doctrine that suing out process is beginning the suit, and contend that the present suit was begun on February 3, 1896, for the reason that process was sued out upon that date. They argue that it does not follow from the fact that the defendants were nonresidents of the state of California, and were corporations created under the laws of other states, that they might not have been found within the Northern district of California for the purpose of service of the writ, and that there is nothing in the bill to indicate that the defendants had not agents or officers within the district upon whom such service might have been had. In short, they contend that process was sued out in good faith, and that, therefore, the suit was begun.

This leads us to inquire what is meant by the term "suing out

process." From the authorities it appears that suing out process in equity is the same in meaning as suing out process in an action at law. It means that, upon the filing of a bill, a writ of subpœna is filled out by the clerk, and is delivered for service. *Blain* v. *Blain,* 45 Vt. 538; *Day* v. *Lamb,* 7 Vt. 426; *Mason* v. *Cheney,* 47 N. H. 24; *Hardy* v. *Corlis,* 21 N. H. 356; *Updike* v. *Ten Broeck,* 32 N. J. Law, 105; *Burdick* v. *Green,* 18 Johns. 14; *Jackson* v. *Brooks,* 14 Wend. 650; *Haughton* v. *Leary,* 3 N. C. 21; *Webster* v. *Sharpe* (N. C.), 21 S. E. 912; *Hail* v. *Spencer,* 1 R. I. 17; *Gardner* v. *Webber,* 17 Pick. 407; *Evans* v *Galloway,* 20 Ind. 479; *Whitaker* v. *Turnbull,* 18 N. J. Law, 172. In order that the writ be deemed to be sued out, it must have left the possession of the officer who issued it, and must either have reached the possession of the officer who is to serve it, or the possession of some one who is the medium of transmission to such officer. But this is not sufficient to toll the statute of limitations. The delivery of the writ must be followed either by a service of the same or by a bona fide effort to serve it. If nothing be done with the writ after its issuance, if it be returned unserved, or without the bona fide effort to serve it, and a new writ be taken out, the date of the commencement of the suit will be postponed to the date of the second writ. Equity rule 7 prescribes that "the process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill." There can be no doubt, in view of the averments of the bill, that if the subpœna in this case had been delivered upon its issuance to the marshal for the Northern district of California, for service upon the defendants in case they could be found in that district, and a bona fide effort had been made to serve them therein, and that effort had been followed by timely proceedings to acquire jurisdiction by substituted service, the commencement of the suit would relate back to the date when the writ was so issued. So, also, it would seem that if, under the bill in this case, without the issuance of a subpœna, proceedings had been had according to the act of March 3, 1875, to obtain the special order therein provided for, the suit would have been begun at the moment when the special order was issued and delivered for service. *Forsyth* v. *Pierson,* 9 Fed. 801; *Batt* v. *Proctor,* 45 Fed. 515. But see, *contra, Bronson* v. *Keokuk,* 2 Dill. 498, Fed. Cas. No. 1,928. But, whether we measure the effort to make service in this case

by what was actually done or by the intention, the steps that were taken come short of the requirement of the rule. The only information we have concerning the intention of complainant or its counsel in suing out the writ is afforded—First, by the præcipe, and, second, by what was done with the writ. From the præcipe it appears that the intention was to send the subpœnas forthwith without the state for service. From the writs themselves it appears that they never came into the hands of the officer who was authorized to serve them, the marshal of the Northern district of California, but that they were sent to persons who were without authority to serve the same, and were by them subsequently returned to the clerk's office. It is needless to say that the process of the court could not run beyond the court's territorial jurisdiction. In deciding whether there was an effort to serve the subpœnas in good faith, we must be guided by a consideration of what the law required in order to effect a valid service. It does not aid the bona fides of the attempt to serve that the appellant's counsel thought that the subpœnas could be legally served by the persons to whom they were sent. It is immaterial what may have been his belief or his opinion in that regard. The bona fides must be shown by proof that an effort was made to proceed according to law, and that use was made, or attempted to be made, of the means which the law prescribes. After the writs were issued in this case, not a step was taken in the line of lawful procedure. Sending the writs without the district in which only they could be served, and to persons who were without power to serve them, were vain and futile acts. The delivery of copies of the subpœnas to the defendants at their offices in Illinois and New York, while it was sufficient to give them actual notice that a bill had been filed against them, was neither a service nor an attempted service upon them, and was of no greater effect than any other notice which they might have received of the same fact. In short, it may be said that up to the 5th day of March, 1896, nothing had been done to begin the suit except to file the bill, and to cause subpœnas to issue, which subpœnas were subsequently returned to the clerk's office.

It is argued that the court should construe liberally, in favor of the United States, a self-imposed statute of limitations, and the case of *U. S.* v. *American Bell Tel. Co.*, 159 U. S. 548, 16 Sup. Ct. 69, is cited. The doctrine of that case, and of the precedents on which it is sustained, is confined in its application to cases in which

uncertainty exists as to the intention of the legislature to impose the limitation In the present case no doubt is suggested by the language of the statute, and there is no room for construction. It is clear that congress has said that all suits by the United States to vacate patents shall be brought within the period limited by the act. The only question we are called upon to decide is whether this suit has been within that period. In determining at what point in the proceedings a suit shall be deemed to be commenced, we have no warrant for holding that the rule applicable to a suit on behalf of the United States shall differ from that applicable to other cases. When the United States, through its congress, has said that suits in its favor shall be brought only within a stated period, we have no criterion for determining whether a given suit was commenced within that period, except to apply the rules and principles applicable to all suitors. The decree of the circuit court will be affirmed.

PROCESS.

Crowell v. *Botsford*, 16 N. J. Eq. 458. (1863.)

The bill in this cause was filed to foreclose a chattel mortgage. The subpœna was issued before the filing of the bill, but no notice was taken of the irregularity, and the cause was allowed to proceed to final decree and execution. The defendant now asks to set aside all the proceedings in the cause, on the ground that the subpœna was issued and served before the bill was filed.

THE CHANCELLOR:

The defendant asks to set aside the execution, final decree, and all the proceedings in the cause, on the ground that the subpœna was issued and served before the bill was filed.

The statute provides that no subpœna or other process for appearance, shall issue out of the Court of Chancery, except in cases to stay waste, until after the bill shall have been filed with the clerk of the court. Nix. Dig. 97, § 6.

The proceeding on the part of the complainant was clearly irregular, and had the irregularity been promptly brought to the notice of the court, the subpœna, on motion for that purpose, would

have been set aside as illegally issued. The effect would have been to compel the complainant to pay the costs of the motion and to sue out a new subpœna.

But no such motion was made. The complainant was permitted, without objection, to proceed to final decree and to sue out execution.

Where a party seeks to set aside the proceedings of his adversary for an irregularity which is merely technical, he must make his application for that purpose at the first opportunity. If a solicitor, after notice of an irregularity, takes any step in the cause, or lies by and suffers his adversary to proceed therein under a belief that his proceedings are regular, the court will not interfere to correct the irregularity, if it is merely technical. *Hart* v. *Small,* 4 Paige 288; *Parker* v. *Williams, Ibid.* 439.

It is now insisted that the irregularity is not technical; that the statute is not directory merely, but imperative; and that no valid decree can be made, except there be a strict compliance with its requirements.

The provision of the statute is a regulation of the practice of the court, directing the mode in which its proceedings shall be conducted. The time or form in which the thing is directed to be done is not essential. The proceedings in such cases are held valid, though the command of the statute is disregarded or disobeyed. Sedgwick on Statutes, 368.

That this is the effect and operation of the statutes is apparent, not only from the nature and design of the enactment, but from a reference to its origin and the history of the practice under it.

The commencement of a suit in chancery was originally by bill, before the issuing of a subpœna. The bill contained, as it still does, a prayer for subpœna, which issued as soon as the bill was filed. Gilbert's For. Rom. 64; 3 Bl. Com. 442-3.

Yet in a very early treatise upon the proceedings of the Court of Chancery, it is stated that "notwithstanding the practice before this time hath been that no subpœna should be sued forth of the Court of Chancery, without a bill first exhibited; yet of late, for the ease of all suitors and subjects, it hath been thought good that every man may have a subpœna out of the same court, without a bill first exhibited." Tothill's Proceed. 1.

And by Lord Clarendon's orders in chancery, in 1661, it is directed, "that all plaintiffs may have liberty to take forth *sub-*

pœnas ad respondendum before the filing of their bills, if they please, notwithstanding any late order or usage to the contrary." Beames' Orders in Chan. 168.

This order continued in force until 1705, when it was enacted (by statute of Ann, ch. 16, § 22), that no "subpœna or any other process for appearance, do issue out of any court of equity, till after the bill is filed, except in cases of bills for injunctions to stay waste, or stay suits at law commenced." The statute is equally peremptory in its terms with our own, yet it has always been regarded as directory only, and a departure from its requirements a mere irregularity, which subjected the party to costs.

In Hinde's Ch. Pr. 76, it is said that, notwithstanding the statute, "solicitors, through ignorance and inattention, frequently sue out and serve this writ before the bill be filed, taking care to file the bill on the return day, yet that practice is altogether irregular (except in cases in the statute excepted), and the complainant does it at the risk of costs."

The elementary books all treat the issuing of the subpœna before the filing of the bill, since the passage of the statute, as an irregularity, which exposes the complainant to the hazards of costs. 1 Newland's Pr. 62; 2 Maddock's Ch. Pr. 197; 1 Smith's Ch. Pr. 110; 1 Daniell's Ch. Pr. 592.

The same rule prevailed under the ancient practice of the court, prior to the adoption of Lord Clarendon's order, authorizing the subpœna to be issued before the filing of the bill.

Cases are very frequent, during the reign of Elizabeth, where costs are adjudged to the defendant, for want of a bill after the service of a subpœna. Cary's R. 98, 103, 105, 114, 118, 143, 145, 153, 156.

Although the defendant was entitled to costs, yet by "preferring costs" he was not relieved from appearing when the bill was filed, and so little was gained by the proceeding, that the practice has become obsolete. It is considered most advantageous for the defendant, when he has been improperly served with a subpœna before filing the bill, to wait till the attachment has been issued against him, and then to move *to set the process aside for irregularity.* The effect of such a proceeding is to oblige the plaintiff to sue out and serve a fresh subpœna. 1 Daniell's Ch. Pr. 593.

This, in its operation, is in accordance with the practice in this court, although no resort is had with us to the writ of attachment.

The issue of the subpœna before bill filed, is an irregularity so purely technical, that it is waived by an appearance. 1 Daniell's Ch. Pr. 593.

There is another objection which is equally decisive against the motion. It appears, by the evidence, that the subpœna was issued before the filing of the bill, in consequence of a written offer by the defendant's solicitor to enter *an appearance* for the defendant. An acknowledgment of the legal service of the subpœna was endorsed upon the writ. At the time of the endorsement, the defendant's solicitor knew that the bill had not been filed. The complainant's solicitor was justified in regarding the acts of the defendant's solicitor, as an appearance for the defendant, and as a waiver of the irregularity in the issue of the writ. Nix. Dig. 98, § 20.

There is no evidence of surprise or merits. The application rests solely on the ground of illegality of the proceedings on the part of the complainants.

The motion must be denied, and the rule to show cause discharged, with costs.

Phœnix Ins. Co. v. *Wulf, 9 Bissl. (U. S.) 285. (1880.)*

GRESHAM, J.:

The defendant, Bertha Wulf, owned certain real estate in Indianapolis, which she conveyed, her husband joining, to a third person, who conveyed it back to her husband, Henry Wulf. The husband, the wife joining, then mortgaged the same property to the Phœnix Mutual Life Insurance Company to secure a loan. The mortgage showed upon its face that it was to secure a loan to the husband. The loan was not paid at maturity, and afterward the mortgage was foreclosed in this court. Bertha Wulf subsequently brought suit in this court to set aside her deed to the third party, his deed to her husband, and the mortgage of herself and husband to the insurance company, on the sole ground that she was a minor when she executed those instruments. The service in the foreclosure suit was after Bertha Wulf had attained her majority, and the decree against her was by default.

The marshal's return shows that the subpœna in the foreclosure suit was properly served on Henry Wulf, in compliance with equity

rule 13. As to the wife, the return read thus: "I served Bertha Wulf by leaving a copy for her with her husband." Sometime after the wife commenced her suit, as already stated, the marshal appeared and asked leave to amend his return, so as to show that he had served the subpœna on her by leaving a copy for her with her husband, at her dwelling house or usual place of abode.

The defendant Henry Wulf, occupied a building at the corner of Virginia avenue and Coburn street, in Indianapolis, both as a dwelling and a family grocery. In the lower story there were two rooms, the main one being occupied as a grocery and the back smaller one for storage purposes. These two rooms were separated by a hall which was entered by a door from Coburn street, and also from Virginia avenue through the grocery. A stairway led from the hall to the second story, where the family dwelt, eating and sleeping. The hall and stairway were accessible in both ways, and were, in fact, approached in both ways. The deputy marshal found the husband in the grocery and there served the subpœna on him and then inquired for his wife, and was informed that it was early in the morning and she was upstairs in bed where the family lived. The officer then, in the grocery, handed to the husband a copy of the subpœna for his wife.

Upon these facts was there a valid service on the wife under the 13th equity rule, which declares that the service of all subpœnas shall be by delivery of a copy thereof, by the officer serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant with some adult person who is a member or resident in the family?

It is urged by counsel that the officer handed to the husband a copy of the subpœna when he was not at the "dwelling house or usual place of abode"—that the grocery room was as distinct from the residence in the upper story, as if the two had been in separate buildings wide apart. That construction of the rule is narrow and unreasonable. It is conceded that if the officer had handed the copy to the husband in the hall the service would have been good, because the upper story was approached only through the hall, and it was therefore connected with the dwelling. There were but two ways of ingress to the residence or upper story—one from Virginia avenue, through the grocery, and the other through the door opening from Coburn street. The family passed in and out both ways, as best suited their convenience. A copy was left with one who

understood its contents and was likely to deliver it to the person for whom it was intended.

The case of *Kibbe* v. *Benson,* 17 Wallace, 625, is cited against the sufficiency of the service. That was an action of ejectment in the Circuit Court of the United States for the Northern District of Illinois, which had adopted the statute of that state relating to actions of ejectment. After judgment was entered for the plaintiff by default, the defendant filed a bill in equity to set aside the judgment on the ground that he had no notice or knowledge of the pendency of the suit, and for fraud. The Illinois statute required that in actions of ejectment, when the premises were actually occupied, the declaration should be served by delivering a copy to the defendant named therein, who should be in the occupancy of the premises, or, if absent, by leaving the same with a white person of the family of the age of ten years or upwards "at the dwelling house of such defendant."

On the trial of the equity suit one Turner swore that when he called at Benson's house to serve upon him the declaration, he was informed by Benson's father that Benson was not at home, and that while the father was standing near the southeast corner of the yard, adjoining the dwelling house and inside the yard, and not over 125 feet from the dwelling house, he handed him a copy of the declaration, explaining its nature, and requesting him to hand it to his son, after which the father threw the copy upon the ground muttering some angry words.

There was a conflict in the testimony, but the Circuit Court decided that even if the copy was handed to the father, as testified to by Turner, the service was not sufficient, and set aside the judgment which had been entered by default, and the decree was affirmed on appeal. In deciding the case the Supreme Court say "it is not unreasonable to require that it (copy of the declaration) should be delivered on the steps or on a portico, or in some out house adjoining to or immediately connected with the family mansion, where, if dropped or left, it would be likely to reach its destination. A distance of 125 feet and in a corner of the yard is not a compliance with the requirements."

Rule 13 should receive a liberal construction. It does not require the copy of the subpœna to be left with a person *in* the dwelling house; it is sufficient if the person who receives the copy is *at* the

dwelling house. The rule is satisfied by a service outside the dwelling house at the door, just as well as inside the house.

I think Bertha Wulf was in court when the decree of foreclosure was entered. This is not a motion to correct the pleadings, judgment or process.

Courts have the power to permit officers to amend their returns to both mesne and final process, and the power is exercised liberally in the interest of justice, especially when the rights of third parties are not to be affected by the amendment.

In the exercise of a sound discretion they have allowed officers to amend their returns according to the real facts after the lapse of several years, and when there is no doubt about the facts such amendments have been allowed after the officer's term has expired.*

I think justice requires that the amendment should be allowed in this case.

DEFAULT AND DECREE PRO CONFESSO.

Thomson v. *Wooster, 114 U. S. 104. (1884.)*

The appellee in this case, who was complainant below, filed his bill against the appellants, complaining that they infringed certain letters patent for an improved folding guide for sewing machines, granted to one Alexander Douglass, of which the complainant was the assignee. The patent was dated October 5, 1858, was extended for seven years in 1872, and was reissued in December, 1872. The suit was brought on the reissued patent, a copy of which was annexed to the bill, which contained allegations that the invention patented had gone into extensive use, not only on the part of the complainant, but by his licensees; and that many suits had been brought and sustained against infringers. The bill further alleged that the defendants, from the time when the patent was reissued down to the commencement of the suit, wrongfully and without license, made, sold and used, or caused to be made, sold and used, one or more folding guides, each and all containing the said im-

Adams v. *Robinson*, 1 Pickering, 461; *Johnson* v. *Day*, 17 Pickering, 106; *People* v. *Ames*, 35 New York, 482; *Jackson* v. *O. & M. R. R.*, 15 Indiana, 192; *DeArmon* v. *Adams*, 25 Indiana, 455. Freeman on Executions, §§ 358 and 359; Herman on Executions, § 248.

provement secured to the complainant by the said reissued letters patent, and that the defendants derived great gain and profits from such use, but to what amount the complainant was ignorant, and prayed a disclosure thereof, and an account of profits, and damages, and a perpetual injunction.

The bill of complaint was accompanied with affidavits verifying the principal facts and certain decrees or judgments obtained on the patent against other parties, and Douglass's original application for the patent, made in April, 1856, a copy of which was annexed to the affidavits. These affidavits and documents were exhibited for the purpose of obtaining a preliminary injunction, which was granted on notice.

The defendants appeared to the suit by their solicitor, May 3, 1879, but neglected to file any answer, or to make any defence to the bill, and a rule that the bill be taken *pro confesso* was entered in regular course June 10, 1879. Thereupon, on the 2d of August, 1879, after due notice and hearing, the court made a decree to the following effect, viz.: 1st. That the letters-patent sued on were good and valid in law. 2d. That Douglass was the first and original inventor of the invention described and claimed therein. 3d. That the defendants had infringed the same by making, using and vending to others to be used, without right or license, certain folding guides substantially as described in said letters patent. 4th. That the complainant recover of the defendants the profits which they had derived by reason of such infringement by any manufacture, use or sale, and any and all damages which the complainant had sustained thereby; and it was referred to a master to take and state an account of said profits, and to assess said damages, with directions to the defendants to produce their books and papers and submit to an oral examination if required. It was also decreed that a perpetual injunction issue to restrain the defendants from making, using, or vending any folding guides made as theretofore used by them, containing any of the inventions described and claimed in the patent, and from infringing the patent in any way.

Under this decree the parties went before the master, and the examination was commenced in October, 1879, in the presence of counsel for both parties, and was continued from time to time until November 3, 1880, when arguments were heard upon the matter, and the case was submitted. On November 12th the report

was prepared and submitted to the inspection of counsel. On the 18th motion was made by the defendants' counsel, before the master, to open the proofs and for leave to introduce newly discovered evidence. This motion was supported by affidavits, but was overruled by the master, and his report was filed December 10, 1880, in which it was found and stated that the defendants had used at various times, from January 18, 1877, to the commencement of the suit, twenty-seven folding guides infringing the complainant's patent, and had folded 1,217,870 yards of goods by their use, and that during that period there was no means known or used, or open to the public to use, for folding such goods in the same, or substantially the same manner, other than folding them by hand, and that the saving in cost to the defendants by using the folding guides was three cents on each piece of six yards, making the amount of profit which the complainant was entitled to recover, $6,089.35; and that during the same period the complainant depended upon license fees for his compensation for the use of the patented device, and that the amount of such fees constituted his loss or damage for the unauthorized use of his invention: and that, according to the established fees, the defendants would have been liable to pay for the use of the folding guides used by them during the years 1877, 1878 and 1879 (the period covered by the infringement), the sum of $1,350, which was the amount of the complainant's damages. The evidence taken by the master was filed with his report.

By a supplemental report, filed at the same time, the master stated the fact of the application made to him to open the proofs on the ground of surprise and newly discovered evidence (as before stated), and that after hearing said application upon the affidavits presented (which were appended to the report), he was unable to discover any just ground therefor.

The defendants did not object to this supplemental report, but on the 10th of January, 1881, they filed exceptions to the principal report, substantially as follows:

1. That instead of the double guide or folder claimed in the complainant's patent being the only means for folding cloth or strips on each edge during the period of the infringement (other than that of folding by hand), the master should have found that such strips could have been folded by means of a single guide or folder, and that the use of such guides was known and open to

the public long before 1877, and that such guides were not embraced in the complainant's patent.

2. That the amount of profits found by the master was erroneous, because it appeared that folded strips such as those used by the defendants were an article of merchandise, cut and folded by different parties at a charge of 25 cents for 144 yards.

3. That the profits should not have been found greater than the saving made by the use of the double guide as compared with the use of a single guide, or greater than the amount for which the strips could have been cut and folded by persons doing such business.

4. That the damages found were erroneous.

Other exceptions were subsequently filed, but were overruled for being filed out of time.

Before the argument of the exceptions the defendants gave notice of a motion to the court to refer the cause back to the master to take further testimony in reference to the question of profits and damages chargeable against them under the order of reference. In support of this motion further affidavits were presented.

The exceptions to the report and the application to refer the cause back to the master were argued together. The court denied the motion to refer the cause back, overruled the exceptions to the report, and made a decree in favor of the complainant for the profits, but disallowed the damages. That decree the respondents brought here by appeal.

They assigned fourteen reasons for appeal, of which the first nine related to the proceedings before the master and his report, and the last five to the validity of the reissued patents.

MR. JUSTICE BRADLEY delivered the opinion of the court. After stating the facts in the foregoing language, he continued:

The appellants have assigned fourteen reasons or grounds for reversing the decree. The first nine relate to the taking of the account before the master and his report thereon; the last five relate to the validity of the letters patent on which the suit was brought. It will be convenient to consider the last reasons first.

The bill, as we have seen, was taken *pro confesso,* and a decree *pro confesso* was regularly entered up, declaring that the letters patent were valid, that Douglass was the original inventor of the invention therein described and claimed, that the defendants were

infringing the patent, and that they must account to the complainant for the profits made by them by such infringement and for the damages he had sustained thereby; and it was referred to a master to take and state an account of such profits and to ascertain said damages.

The defendants are concluded by that decree, so far at least as it is supported by the allegations of the bill, taking the same to be true. Being carefully based on these allegations, and not extending beyond them, it cannot now be questioned by the defendants unless it is shown to be erroneous by other statements contained in the bill itself. A confession of facts properly pleaded dispenses with proof of those facts, and is as effective for the purposes of the suit as if the facts were proved; and a decree *pro confesso* regards the statements of the bill as confessed.

By the early practice of the civil law, failure to appear at the day to which the cause was adjourned was deemed a confession of the action; but in later times this rule was changed, so that the plaintiff, notwithstanding the contumacy of the defendant, only obtained judgment in accordance with the truth of the case as established by an *ex parte* examination. Keller, Proced. Rom. § 69. The original practice of the English Court of Chancery was in accordance with the later Roman law. *Hawkins* v. *Crook*, 2 P. Wms. 556. But for at least two centuries past bills have been taken *pro confesso* for contumacy. *Ibid.* Chief Baron Gilbert says: "Where a man appears by his clerk in court, and after lies in prison, and is brought up three times to court by habeas corpus, and has the bill read to him, and refuses to answer, such public refusal in court does amount to the confession of the whole bill. Secondly, when a person appears and departs without answering, and the whole process of the court has been awarded against him after his appearance and departure, to the sequestration; there also the bill is taken *pro confesso*, because it is presumed to be true when he has appeared and departs in despite of the court and withstands all its process without answering." Forum Romanum, 36. Lord Hardwicke likened a decree *pro confesso* to a judgment by *nil dicit* at common law, and to judgment for plaintiff on demurrer to the defendant's plea. *Davis* v. *Davis*, 2 Atk. 21. It was said in *Hawkins* v. *Crook*, *qua supra*, and quoted in 2 Eq. Ca. Ab. 179, that "The method in equity of taking a bill *pro confesso* is consonant to the rule and practice of the courts at law, where,

if the defendant makes default by *nil dicit,* judgment is immediately given in debt, or in all cases where the thing demanded is certain; but where the matter sued for consists in damages, a judgment interlocutory is given; after which a writ of inquiry goes to ascertain the damages, and then the judgment follows." The strict analogy of this proceeding in actions of law to a general decree *pro confesso* in equity in favor of the complainant, with a reference to a master to take a necessary account, or to assess unliquidated damages, is obvious and striking.

A carefully prepared history of the practice and effect of taking bills *pro confesso* is given in *Williams* v. *Corwin,* Hopkins Ch. 471, by Hoffman, master, in a report made to Chancellor Sanford, of New York, in which the conclusion come to (and adopted by the Chancellor), as to the effect of taking a bill *pro confesso,* was that "when the allegations of a bill are distinct and positive, and the bill is taken as confessed, such allegations are taken as true without proofs," and a decree will be made accordingly; but "where the allegations of a bill are indefinite, or the demand of the complainant is in its nature uncertain, the certainty requisite to a proper decree must be afforded by proofs. The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which from their nature and the course of the court require an examination of details, the obligation to furnish proofs rests on the complainant."

We may properly say, therefore, that to take a bill *pro confesso* is to order it to stand as if its statements were confessed to be true; and that a decree *pro confesso* is a decree based on such statements, assumed to be true, 1 Smith's Ch. Pract. 153, and such a decree is as binding and conclusive as any decree rendered in the most solemn manner. "It cannot be impeached collaterally, but only upon a bill of review, or [a bill] to set it aside for fraud. 1 Daniell Ch. Pr. 696, 1st Ed.;* *Ogilvie* v. *Herne,* 13 Ves. 563.

* Note by the Court.—Reference is made to the 1st Edition of Daniell (pub. 1837) as being, with the 2d Edition of Smith's Practice (published the same year), the most authoritative work on English Chancery Practice in use in March, 1842, when our Equity Rules were adopted. Supplemented by the General Orders made by Lords Cottenham and Langdale in August, 1841 (many of which were closely copied in our own Rules), they exhibit that "present practice of the High Court of Chancery in England," which by our 90th Rule was adopted as the standard of equity practice in cases where the Rules prescribed by this court, or by the

Such being the general nature and effect of an order taking a bill *pro confesso,* and of a decree *pro confesso* regularly made thereon, we are prepared to understand the full force of our rules of practice on the subject. Those rules, of course, are to govern so far as they apply; but the effect and meaning of the terms which they employ are necessarily to be sought in the books of authority to which we have referred.

By our rules a decree *pro confesso* may be had if the defendant, on being served with process, fails to appear within the time required; or if, having appeared, he fails to plead, demur or answer to the bill within the time limited for that purpose; or, if he fails to answer after a former plea, demurrer or answer is overruled or declared insufficient. The 12th Rule in Equity prescribes the time when the subpœna shall be made returnable, and directs that "at the bottom of the subpœna shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*" The 18th Rule requires the defendant to file his plea, demurrer or answer (unless he gets an enlargement of the time) on the rule day next succeeding that of entering his appearance; and in default thereof the plaintiff may at his election, enter an order (as of course) in the order book, that the bill be taken *pro confesso,* and thereupon the cause shall be proceeded in *ex parte,* and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, etc. And the 19th Rule declares that the decree rendered upon a bill taken *pro confesso* shall be deemed absolute, unless the court shall at the same term set aside the

Circuit Court, do not apply. The 2d Edition of Mr. Daniell's work, published by Mr. Headlam in 1846, was much modified by the extensive changes introduced by the English Orders of May 8, 1845; and the 3d Edition, by the still more radical changes introduced by the Orders of April, 1850, the Statute of 15 & 16 Vict. c. 86, and the General Orders afterwards made under the authority of that statute. Of course the subsequent editions of Daniell are still further removed from the standard adopted by this court in 1842; but as they contain a view of the later decisions bearing upon so much of the old system as remains, they have, on that account, a value of their own, provided one is not misled by the new portions.

same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant.

It is thus seen that by our practice, a decree *pro confesso* is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it; but that it is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill, assumed to be true. This gives it the greater solemnity, and accords with the English practice, as well as that of New York. Chancellor Kent, quoting Lord Eldon, says: "Where the bill is thus taken *pro confesso,* and the cause is set down for hearing, the course (says Lord Eldon, in *Geary* v. *Sheridan,* 8 Ves. 192), is for the court to hear the pleadings, and itself to pronounce the decree, and not to permit the plaintiff to take, at his own discretion, such a decree as he could abide by, as in the case of default by the defendant at the hearing." *Rose* v. *Woodruff,* 4 Johns. Ch. 547, 548. Our rules do not require the cause to be set down for hearing at a regular term, but, after the entry of the order to take the bill *pro confesso,* the 18th rule declares that thereupon the cause shall be proceeded in *ex parte,* and *the matter of the bill may be decreed by the court* at any time after the expiration of thirty days from the entry of such order, if it can be done without answer, *and is proper to be decreed.* This language shows that the matter of the bill ought at least to be opened and explained to the court when the decree is applied for, so that the court may see that the decree is a proper one. The binding character of the decree, as declared in Rule 19, renders it proper that this degree of precaution should be taken.

We have been more particular in examining this subject because of the attempt made by the defendants, on this appeal, to overthrow the decree by matters outside of the bill, which was regularly taken *pro confesso.* From the authorities cited, and the express language of our own Rules in Equity, it seems clear that the defendants, after the entry of the decree *pro confesso,* and whilst it stood unrevoked, were absolutely barred and precluded from alleging anything in derogation of, or in opposition to, the said decree, and that they are equally barred and precluded from questioning its correctness here on appeal, unless on the face of the bill it appears manifest that it was erroneous and improperly granted.

CHAPTER V.

PROCEEDINGS ON BEHALF OF DEFENDANT.

Appearance.

Flint v. *Comly, 95 Me. 251. (1901.)*

Exceptions by defendants. Overruled.

Bill in equity by Lucy M. Flint of Cornish, in the county of York, administratrix of the goods and estate of Fred T. Flint, late of said Cornish, deceased, against Robert Comly of Philadelphia, and William Flanigen of Woodbury, New Jersey, co-partners in business under the firm name and style of Comly and Flanigen, and against Charles E. Perkins of Portland. The bill asserts a lien or interest in certain mortgages and pledges of real estate and personal property held by the non-resident defendants, and against the estate of the said Fred T. Flint.

After several hearings the plaintiff moved to convert the cause into an action at law. This motion having been granted the defendants excepted.

Sitting: Wiswell, C. J., Emery, Whitehouse, Strout, Fogler, JJ.

Wiswell, C. J.:

The plaintiff commenced a bill in equity against three defendants, one a resident of the state, the other two non-residents, which was duly entered and filed in the office of the clerk of this court for Cumberland county, on July 7, 1899. Thereupon a subpœna issued against the resident defendant, who subsequently entered his appearance, and an order issued as to the non-resident defendants to appear and answer within one month from the first Tuesday of August, 1899. There was no service of this order in this state, but upon November 8, 1899, counsel for the non-resident defendants entered upon the docket a general and unconditional appearance in the manner provided by Chancery Rule VIII, and on January 23, 1900, the joint answer of these non-resident defendants was filed, signed in their names by their solicitors.

Prior to this, on July 7, 1899, a preliminary injunction had

been issued against the resident defendant, without a hearing, but upon the filing of the statutory bond. Later, he filed a motion to dissolve this injunction, upon which motion a hearing was had, but before a decision had been rendered, on January 24, 1900, the plaintiff moved to discontinue as to the resident defendant and three days later this motion was granted with costs for him. On January 24, 1900, the plaintiff also filed this motion: "Now comes the plaintiff in the above entitled cause and shows unto your Honors that the matter in controversy may be adequately and completely determined in a suit at law, and that the issues presented may be more conveniently described according to the course of the common law, than in equity. Wherefore, she prays leave of the court to convert her said action into an action at law upon such reasonable terms as the court may be pleased to order, etc." The docket shows this entry under date of January 27, 1900: "Motion to convert cause into an action at law granted."

To this order the defendants took exception and, without any thing further being done in the case, entered the same at the next law court. It might be questioned as to whether this bill of exceptions was not prematurely brought forward, as the exception was to an interlocutory order and perhaps should not have been entered until the completion of the case, when it might have become unnecessary to prosecute the exceptions. R. S., c. 77, §§ 22 and 25; *Maine Benefit Association* v. *Hamilton,* 80 Maine, 99. But, as the procedure under the Act of 1893 is somewhat anomalous, and as there has already been considerable delay in the case, we think it more in the interests of justice that the question involved should now be determined, which course is not without precedent in this state, even if it were clear that the exceptions were prematurely brought forward. *Stevens* v. *Shaw,* 77 Maine, 566.

It is argued that this court had no jurisdiction over the non-resident defendants, that no service of the bill was ever made upon them in Maine, and no fact set up in the bill which would subject them to the jurisdiction of this court, except the alleged fact that their co-defendant had in his possession certain property or evidences of indebtedness belonging to the non-resident defendants not open to attachment; that when the bill was discontinued as to the resident defendant, the court then had no jurisdiction whatever over these defendants; and that this discontinuance as to the other

defendant, by leave of court and upon the plaintiff's motion, was equivalent to an admission by the plaintiff and a decision by the court that the court had no further jurisdiction over these defendants.

The answer to all this is, that the defendants by their duly authorized counsel entered a general and unconditional appearance, thereby voluntarily submitting themselves to the jurisdiction of the court, although independently of this voluntary action upon their part the court may have had no jurisdiction over them. It is said in Daniell's Chancery Pleading and Practice, p. 536: "Appearance is the process by which a person, against whom a suit has been commenced, submits himself to the jurisdiction of the court."

And in the Encyl. of Pleading and Practice, Vol. 2, page 639, "It is a universal rule, which admits of no exception, that, if the court has jurisdiction of the subject matter, a general appearance gives jurisdiction over the person. The principle that a general appearance confers personal jurisdiction is of great importance when a non-resident is sued. In a personal action brought against a citizen of another state, the court does not acquire jurisdiction over him by virtue of notice served on him in such other state. While process can not extend beyond the limits of the state, yet a non-resident becomes subject to the jurisdiction of the court by a general appearance." In support of these propositions authorities are cited from nearly every state in the Union; they are too numerous, and the matter is too well settled to require a citation of these authorities here.

This principle has been several times recognized by this court in actions at law. *Maine Bank* v. *Hervey,* 21 Maine, 38; *Buckfield Branch R. R. Co.* v. *Benson,* 43 Maine, 374; *Thornton* v. *Leavitt,* 63 Maine, 384; *Mahan* v. *Sutherland,* 73 Maine, 158. That the principle is equally applicable to causes in equity will be seen by an examination of the cases above referred to as cited in the Encyl. of Pleading and Practice.

It is suggested in the argument, by defendant's counsel, that in accordance with the equity practice in this state, the court will not assume jurisdiction over a non-resident defendant merely upon the general appearance of counsel and upon an answer signed by counsel, but will require in addition to the general appearance of counsel an answer personally signed by such non-resident defendant, unless service has been made upon him in the state. We are not

aware of any such practice, and no authority to that effect has been called to our attention. Upon the other hand, the rule is that, in the absence of anything to the contrary, the presumption is that an attorney has full right, power and authority to make such appearance. In support of this proposition the authorities are unanimous. Here, there is no suggestion of any want of authority upon the part of the counsel for these defendants to enter a general appearance for them. If these non-resident defendants had desired to object to the jurisdiction of the court, they should have entered a special or conditional appearance. Such an appearance, made for the purpose of urging jurisdictional objections, is clearly recognized by all courts and works upon practice.

It is argued that by Chancery Rule XIV defenses by demurrer or plea may be inserted in an answer, and that an appearance followed by an answer, in which is contained a plea to the jurisdiction, should not have the effect of giving the court jurisdiction over the person of a non-resident defendant, when jurisdiction is acquired in no other way. But, in this case, the defendants' answer does not contain any plea to the jurisdiction of the court over these defendants, nor is objection to the jurisdiction of the court raised in any way; it merely, in one paragraph, denies that the resident defendant had in his possession, or under his control, any property belonging to them. But, even if the defendants in their answer, in which they make answer to the merits of the cause, had also objected to the jurisdiction of the court as to them, it seems, in accordance with the authorities, that even this course would have subjected them to the jurisdiction of the court. The rule is, that when a defendant appears solely for the purpose of objecting to the jurisdiction of the court over his person, such motion is not a voluntary appearance of defendant which is equivalent to service. Where, however, the motion involves the merits of the case, the rule is otherwise. *Elliott* v. *Lawhead,* 43 Ohio State, 172. See also *St. Louis Car Co.* v. *Stillwater St. Ry. Co.,* 53 Minn. 129; *Carroll* v. *Lee,* 3 G. & J. (Md.) 504; *Fitzgerald, etc. Construction Company* v. *Fitzgerald,* 137 U. S. 98; *Tipton* v. *Wright,* 7 Bush, (Ky.) 448.

These defendants having, as we have seen, voluntarily submitted themselves to the jurisdiction of the court, must be held to have done so subject to the method of procedure in this state and to all statutory provisions in relation to procedure, including, among

other things, the power of the court, under chap. 217 Public Laws of 1893, in an equity proceeding, to strike out the pleadings in equity and require the parties to plead at law in the same cause, whenever it appears that the remedy at law is plain, adequate and complete and that the rights of the parties can be fully determined and enforced by a judgment and execution at law, and to then hear and determine the case at law. This provision of the statute applies to all cases pending in equity, and this order may be made by the court, under the conditions named, whenever the court has jurisdiction of the subject matter of the cause and over the persons of the defendants. That this court has jurisdiction of the subject matter of the cause is not denied, and that it acquired jurisdiction over the persons of the defendants, we have already decided. The important thing is that the court has jurisdiction; it matters not how that jurisdiction was acquired over the person of a defendant. If a non-resident defendant has voluntarily submitted himself to the jurisdiction of the court, the procedure must in all respects be the same as if the defendant was a resident of the state.

We have no question, therefore, of the power of the court in this cause, under the conditions named in the act, to order that the pleadings in equity be stricken out and to require the parties to plead at law in the same cause, which may then be heard and determined by the court upon the law side of the court. The cause is the same notwithstanding it has been converted from a cause in equity to an action at law. The section of the act refers to it as "the same cause" and provides that the court may hear and determine "the cause" at law, while by another section of the act it is provided that no attachment shall be affected by this procedure.

It is further contended, by the counsel for the defendants, that although the court attempted to proceed under this Act of 1893, it did not in fact accomplish this intention because of various informalities, and our attention is called to the insufficiency of the plaintiff's motion; the fact that no terms were imposed; and the further fact that in making the order the court did not use the language of the act. It is true that the plaintiff's motion did not contain an averment, "that the remedy at law is plain, adequate and complete, and that the rights of the parties can be fully determined and enforced by a judgment and execution at law." It simply said "that the matter in controversy may be adequately and completely determined in a suit at law, and that the issues presented may be

more conveniently tried according to the course of the common law than in equity." It would have been better practice if the motion had followed the language of the act, but we do not think that any written motion was necessary, or even that this order of the court need be made at the instance or request of either party. It may be made by the court without the motion of either party during the progress of the hearing, if it appears to the court that the conditions named in the act exist. See *Ridley* v. *Ridley,* 87 Maine, 445. Whatever the form of the motion in any case, or if there is no motion, these facts must be made to appear to the court before an order of this kind is made.

Again, the act provides that the order may be made "upon reasonable terms." Here no terms were imposed, and it is claimed that upon this account that the order was not properly made. But we do not think that the statute makes it obligatory upon the court to impose terms: any terms might be unreasonable in a given case. The language of the act is similar to the provision of R. S., c. 82, § 10, "such errors and defects may be amended on motion of either party, on such terms as the court orders." Under this statute it has been held by this court that the matter of imposing any terms was discretionary upon the court. *Bolster* v. *Inhabitants of China,* 67 Maine, 551. Both of these statutes differ from the one allowing an amendment after demurrer, which can only be done, by express provision of the statute, upon the payment of costs.

Lastly, it is argued that the order of the court was not in the language of the act, that the court did not strike out the pleadings in equity and require the parties to plead at law in the same cause, and that it does not appear that the justice who made the order found that the statutory conditions existed. But this finding by the sitting justice was a condition precedent to making the order. We must assume that, before making the order to convert the cause in equity into an action at law, it was made to appear to him that, in the language of the act, "the remedy at law is plain, adequate and complete and that the rights of the parties can be fully determined and enforced by a judgment and execution at law."

The court in the order did not strike out the pleadings in equity and require the parties to plead at law in the same cause. This, however, was the precise effect of the order to convert the cause in equity into an action at law, and was in substance and effect what

was authorized by the statute. It was a brief and concise form of order, by which the court exercised the authority given by this statute.

Exceptions overruled. Case remanded to *nisi prius* for further proceedings.

DISCLAIMER.

Isham v. *Miller*, 44 *N. J. Eq. 61. (1888.)*

On motion to take a disclaimer from the files.

VAN FLEET, V. C.:

The principal object of the suit in this case is to procure a decree declaring a deed, absolute on its face, to be a mortgage. The deed was made by the complainant to the defendant. The bill alleges that the debt, which the deed was intended to secure, has been paid, and also that the defendant, on its payment, conveyed part of the land, which she held as security, to the complainant, and the residue to another person, but that at the time these conveyances were made the defendant was a married woman, having a husband living, who did not join with her in the execution of the deeds, and so, in consequence of the invalidity of her effort to convey, she still stands seized of the legal title to the lands. To unravel this tangle, the complainant seeks a decree declaring that the deed is a mortgage, and that the mortgage debt has been paid, and thus procure an establishment of his own title by a judicial declaration that the defendant's right in the lands has been discharged.

To meet the case thus made by the complainant, the defendant says that she did not have, at the time the complainant filed his bill, any right, title or interest, either legal or equitable, in the lands in question, nor did she claim to have, and also, that if the complainant had applied to her before filing his bill she would have executed any conveyance or release necessary to perfect his title. The complainant moves to strike the defendant's disclaimer from the files. The ground of his motion is that the actionable facts alleged in the bill make a case against which a disclaimer constitutes no defence. Or, to state the ground in another form,

the complainant says, for a defendant standing in the position which the defendant in this case does, to say, I disclaim all right and interest in the subject matter of the litigation, neither shows that the complainant is not entitled, as against the defendant, to the relief he asks, nor that the defendant is entitled to a dismissal. A disclaimer is a mode of defence, and if it prevails the defendant must be dismissed, and, as a general rule, he will have a right to be dismissed with costs to be paid by the complainant. If, however, a defendant attempts to disclaim in a case where his disclaimer does not entitle him to a dismissal, but he must, notwithstanding his disclaimer, still be retained as a party defendant, in order that the relief, which the facts alleged in the bill show the complainant to be entitled to, may be decreed to him, the pleading, being useless to the defendant and without effect in the cause, except as an obstruction, will be ordered to be taken from the files. Judge Story states the rule on this subject as follows: "A defendant cannot, by a disclaimer, deprive the plaintiff of the right of requiring a full answer from him, unless it is evident that the defendant ought not, after such disclaimer, to be retained as a party to the suit. For a plaintiff may have a right to an answer, notwithstanding a disclaimer; and in such a case the defendant cannot shelter himself from answering by alleging that he has no interest." Story's Eq. Pl. § 840. This statement of the rule simply repeats what was declared by Lord Eldon in *Glassington* v. *Thwaites,* 2 Russ. 458, and by Chancellor Walworth in *Ellsworth* v. *Curtis,* 10 Paige 105. And Lord Cottenham, in *Graham* v. *Coape,* 3 Myl. & Cr. 638, held that the course to be pursued, where a defendant disclaimed when he ought to answer, was to order the disclaimer to be taken from the files.

Now, it is entirely certain that the defendant is not entitled to a dismissal, for, giving her disclaimer its utmost effect, it is still, on the admitted facts of the case, so plain as to be beyond dispute that, notwithstanding her conveyances, she still holds the legal title to the lands in question, and will, while she and her husband both live, continue to do so until one of two things happens, namely, until she and her husband join in making a conveyance of the lands, or it is judicially declared that she simply held the legal title to them in pledge as security for the payment of a debt, and that the debt has been paid. For the

defendant to say that she disclaims all right and title to the lands amounts to absolutely nothing at all, either as a ground of dismissal, or as a means of transmitting or relinquishing her right. The thing that the complainant wants is a judicial declaration that the deed which he made to the defendant is not what on its face it purports to be, but a mortgage. If the facts stated in his bill are true, the complainant is unquestionably entitled to such a declaration. In view of the facts alleged in the bill, such a declaration can be made against nobody but the defendant. Without her before the court as a party defendant, the suit, for all practical purposes, will be abated, and no decree can be made, for she is the only person against whom relief, of the kind sought, can be given. This statement of the issue tendered by the bill shows, as I think conclusively, that any pleading on the part of the defendant which does not in substance either deny or admit that the deed is a mortgage, does not in any manner meet the complainant's case. A disclaimer, in view of the case made by the complainant's bill, is obviously without either object or effect. The complainant's motion must prevail.

DEMURRER.

Robinson v. *Smith, 3 Paige Ch. (N. Y.) 222. (1832.)*

The bill in this cause was filed by certain stockholders of the New York Coal Company against the directors of that corporation, charging them with improper conduct in the management of their trust. The company was incorporated in April, 1824, with a capital of $200,000. By its charter the company was restricted from carrying on any banking business, and was limited solely to carrying on the business of exploring for, digging, and vending coal. (Laws of 1824, p. 217.) The bill charged that the commissioners named in the act opened books for the subscription to the stock, and that the corporation went into operation in June, 1824, when T. L. Smith, M. Hoffman, J. Minturn, C. Lawton, W. F. Pell, F. Pell, W. Israel, S. Leggett and S. L. Governeur, were chosen directors of the company. That T. L. Smith, was elected president, and R. Abbot was appointed secretary. That soon after the company was organized, the directors pur-

chased thirty acres of land, supposed to contain a coal bed, for which they paid $13,000. That they procured from the land about 3000 bushels of coal, which they took to the city of New York, as a sample. That some time in the course of the same year they sold the land, and, as the bill alleged, they had never since employed the funds of the company for the purpose of carrying on the business of exploring for, digging or vending coal. The bill further stated, that since that time the directors of the company had used and employed their funds almost exclusively in the purchase and sale of the stocks of various corporations and institutions. That they came to a determination to purchase a majority of the stock of the City Bank, and did by their agent purchase 16,000 shares of the stock of that bank at a premium of from two to nine and a half per cent. That they pledged the same to individuals to raise money thereon, at about 90 per cent. upon the par value of the stock, and paid the difference out of the funds of the coal company; and that the individuals to whom the bank stock was pledged, gave to the agent of the coal company their proxies to vote for directors of the bank. That the company ordered its agent to vote for T. L. Smith, C. Lawton, W. F. Pell, and others, as directors of the bank; that he did so vote, and that they were accordingly elected such directors on the first Monday of June, 1825. That the stock of the City Bank was afterwards sold at a loss of from 10 to 20 per cent., by which the coal company lost $50,000. The bill also charged that this operation of the directors of the coal company was to subserve their private purposes, and was in violation of their known duty as directors of the company. The bill further charged that the directors of the coal company also purchased 1500 shares of the New York Gas Light Company, at a premium of from 80 to 100 per cent.; 1000 shares of the New York and Schuylkill Coal Company, at an advance or premium of from 10 to 30 per cent.; 1500 shares of the Bank of America, at a premium of from 3 to 8 per cent.; 1000 shares of the Jersey City Bank, at a premium of from 12 to 25 per cent.; 1500 shares of the Mercantile Insurance Company, at a premium of from 8 to 12 per cent.; 1000 shares of the Franklin Fire Insurance Company, at a premium of from 8 to 20 per cent.; and 1500 shares of the Brooklyn Gas Light Company, at a premium of 7 per cent. That a portion of the said stocks had been since sold and on which the company sustained a loss of about $62,000, exclusive of the

loss on the City Bank stock. That a considerable portion of the stocks thus purchased had not been re-sold, and were greatly diminished in value. That the whole amount of these and other stocks purchased by the directors, or in which the company was interested, amounted to nearly two millions of dollars. By which dealings the directors caused a loss to the coal company of not less than $150,000, and thereby rendered its stock of very little value. The bill further charged that the amount of debts owing by the coal company during a part of the time when these stock speculations were going on, exceeded fifteen times the amount of the capital paid in. The president and secretary were also made defendants; the bill charging that the books and papers of the company were in their possession. The complainants prayed a discovery and for general relief.

The defendant F. Pell, put in a general demurrer to the bill for want of equity. The other defendants put in a general and special demurrer. And for causes of demurrer, they stated that it appeared by the bill; that the complainants were owners of their stock in severalty, and had no joint interest therein; that the capital stock of the company was 4000 shares, and that the complainants were owners of only 160 shares. They therefore insisted that the owners of the other shares should have been made parties.

THE CHANCELLOR:

Before I proceed to examine the merits of this case, it may be proper to refer to the causes assigned as special grounds of demurrer. And first, it is said there are other stockholders who ought to be made parties. Where it is not apparent from the bill itself that necessary parties are omitted, it can be taken advantage of only by plea or answer; showing who are the necessary parties, and making the objection of a want of parties in a plain and explicit manner. (2 Paige's Rep. 280. 1 Monro's Kent. Rep. 107. 1 A. K. Marsh. Rep. 112. 1 Hogan's Rep. 70.) The defendants can demur only when it is apparent from the bill itself that there are other persons who ought to have been made parties. And the demurrer should show who are the proper parties. It is true the capital stock of the corporation is, by the charter, to consist of 4000 shares; and the complainants own but 160. But it also appears from the act of incorporation, that the defendants who were

directors must also have been stockholders. And from aught that appears to the contrary, they may now be the owners of all the residue of the stock subscribed.

The objection for multifariousness cannot be sustained. All of the complainants are *cestui que trusts,* having similar interests, in every respect, and arising out of the same trust. They are seeking precisely the same redress against their trustees, and for the same acts; by which they allege they have received a similar and common injury. There is, therefore, no good reason for requiring them to file separate and distinct bills. It is a favorite object of this court to prevent a multiplicity of suits. And where several persons have a common interest, arising out of the same transaction, although their interest is not joint, even the defendant may sometimes insist that they shall all be made parties, that he may be only subjected to the trouble and expense of one litigation. Upon the principle of the decision of this court, in *Brinckerhoff* v. *Brown* (6 John. Ch. Rep. 139), the complainants were authorized, if not required, to join in this suit.

The objection that a discovery may subject the company to a forfeiture of its charter, is not sufficient to support this general demurrer to the whole bill, both as to the discovery and relief, even if it would have authorized a demurrer to the discovery of particular facts. Under the provisions of the revised statutes, the defendants may be compelled to make a discovery, in certain cases, although it may subject the corporation to a forfeiture of its corporate rights. (2 R. S. 465, § 52.)

If the allegations in this bill are true, there is no doubt that the directors of this company were guilty of a most palpable violation of their duty, by engaging in this gambling speculation in stocks, which was wholly unauthorized by their charter; and which the bill alleges was carried on to subserve their own individual interests and purposes. I have no hesitation in declaring it as the law of this state, that the directors of a monied or other joint stock corporation, who wilfully abuse their trust, or misapply the funds of the company, by which a loss is sustained, are personally liable as trustees to make good that loss. And they are equally liable, if they suffer the corporate funds or property to be lost or wasted by gross negligence and inattention to the duties of their trust. Independent of the provisions of the revised statutes, which were passed after the filing of this bill, this court had juris-

diction, so far as the individual rights of the corporators were concerned, to call the directors to account; and compel them to make satisfaction for any loss arising from a fraudulent breach of trust, or the wilful neglect of a known duty. To this extent Chancellor Kent, in the case of *The Attorney General* v. *The Utica Ins. Co.* (2 Johns. Ch. Rep. 389), admitted the court had jurisdiction; although he doubted the general powers of this court over the corporation itself to prevent an abuse of its corporate privileges. Until very recently, but few incorporated companies, in which individuals had any direct pecuniary interest, existed in England, except corporations for charitable purposes. And this court would very reluctantly interfere with the concerns of mere municipal corporations, where a sufficient remedy is afforded, by mandamus or quo warranto, or by an indictment against the officers of the corporation, for any abuse of their powers by which the public has sustained an injury. But since the introduction of joint stock corporations, which are mere partnerships, except in form, the principles which were formerly applied to charitable corporations in England, may be very appropriately extended to such companies here. The directors are the trustees or managing partners, and the stockholders are the *cestui que trusts,* and have a joint interest in all the property and effects of the corporation. (See Wood's Inst. B. 1 ch. 8, p. 110. 11 Coke's Rep. 98, b.) And no injury the stockholders may sustain by a fraudulent breach of trust, can, upon the general principles of equity, be suffered to pass without a remedy. In the language of Lord Hardwicke, in a similar case, "I will never determine that a court of equity cannot lay hold of every such breach of trust. I will never determine that frauds of this kind are out of the reach of courts of law or equity; for an intolerable grievance would follow from such a determination." (2 Atk. Rep. 406.) The demurrers on the record are therefore not well taken, and should be overruled.

The defendants have, however, assigned as causes of demurrer, *ore tenus,* that is not alleged in the bill that the corporation, by its officers, refused to sue, or that the defendants are the present directors, having the control of the corporation, and that therefore the suit should have been in the name of the corporation. That even if a sufficient excuse is shown by the bill, for bringing the suit in the name of the stockholders, the corporation should be before the court as a party defendant. I think at least one of these

objections is well taken; and that the corporation should be before the court, either as complainant or as a defendant.

Generally, where there has been a waste or misapplication of the corporate funds, by the officers or agents of the company, a suit to compel them to account for such waste or misapplication should be in the name of the corporation. But as this court never permits a wrong to go unredressed merely for the sake of form, if it appeared that the directors of the corporation refused to prosecute by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation was still under the control of those who must be made the defendants in the suit, the stockholders, who are the real parties in interest, would be permitted to file a bill in their own names, making the corporation a party defendant. And if the stockholders were so numerous as to render it impossible, or very inconvenient to bring them all before the court, a part might file a bill, in behalf of themselves and all others standing in the same situation. (*Hichens* v. *Congreve,* 4 Russ. R. 562.) Although the revised statutes have provided for cases of this kind in future, this bill cannot be sustained, unless it is made to conform to the law as it existed at the time the suit was commenced.

The demurrer *ore tenus* is therefore allowed, upon payment by the defendants of the costs of the demurrer on the record. (*Attorney General* v. *Brown,* 1 Swanst. Rep. 288. *Durdant* v. *Redmond,* 1 Vern. 78.)* But the complainants are to be at liberty to amend, as they may be advised.

Higinbotham v. *Burnet, 5 Johns. Ch. (N. Y.) 184. (1821.)*

THE bill stated, that lot No. 81, in Manlius (part of military bounty lands), was patented to Archibald Elliot. That on the 17th day of January, 1785, before the patent was issued, Elliot, by an agreement contained in the condition of a bond, sold the lot to Leonard Smith, and bound himself to execute a deed of conveyance. On the 4th of November, 1789, Smith, by an assign-

*A demurrer *ore tenus* appears to be in the nature of a new demurrer to the same part of the bill which was before demurred to. And it was allowed in this form, upon the argument of the demurrer on record, to prevent injustice; as the defendant cannot again be allowed to demur to the same matter in any other way. (See 11 Ves. Rep. 70.)

ment endorsed on the bond, sold and assigned the lot and the bond to William I. Vredenbergh. The bond, with the assignment endorsed, was duly deposited in the office of the clerk of Onondaga, pursuant to the act of 1794. On the 28th of August, 1790, Vredenbergh sold and assigned the bond, by an endorsement thereon, together with *all his right, title and interest in and to the land,* to which he was entitled by the said bond, to John Carpenter: and V., at the same time, delivered to Carpenter the patent for the lot, and Elliot's discharge from the army. About the year 1792, Carpenter conveyed the lot in fee to Jeremiah Jackson, who entered upon it, built a house and mills, and made valuable improvements. On the 25th of June, 1799, Jackson reconveyed the lot in fee to Carpenter, with warranty. C. entered on the premises, and continued in possession until his death, in February, 1800. In February, 1806, a partition of the lands of C. was made among his heirs, pursuant to the statute, and the premises in question were allotted to the share of his son, Benjamin C. Ever since the conveyance of Jackson to John C., he and his heirs have been in the peaceable occupation of the premises, to the present time. Since his death (and since the right, if any, of the heirs of V. had accrued), several houses, mills, barns, &c. have been erected on the premises, and other improvements made, to the value of eighteen thousand dollars. That Vredenbergh, at the time of the death of John C., lived at Marcellus, within twenty miles of the premises, and continued to reside there until his death, in 1813; and he was well acquainted with the improvements making on the premises. The plaintiffs are severally seised in fee of parts of the lot, under Benjamin C.; and the defendants are the children and heirs of Vredenbergh.

The bill further stated, that Vredenbergh, at all times, and particularly after the death of John C., disclaimed all interest in the lot, declaring that his whole interest had been conveyed to J. C., and that his heirs were seised thereof in fee. That the heirs of V. claim the lot, denying that any other than an *estate for life* was conveyed by their father, for want of words of inheritance. But the plaintiffs charged, that the conveyance to J. C. was intended to create, and did create an estate in fee. That in May, 1820, the defendants brought actions of ejectment against the plaintiffs, to recover possession of the premises. The plaintiffs prayed a discovery as to the facts stated in the bill, and for a

release from the defendants of any claim to the lot, and that they may be enjoined, &c., and for other relief, &c. An injunction was, accordingly, awarded.

The defendants demurred to the bill: 1. Because the plaintiffs claiming to be seised in fee of the premises, under the conveyance from V., it was a *question of law* only. 2. Because the bill contained no matter of equity.

THE CHANCELLOR:

This is a demurrer to the whole bill, and there are two causes of demurrer assigned. (1.) That the plaintiffs claim to be seised in fee of the premises, and therefore the matter is properly and exclusively cognizable at law. (2.) That the bill contains no matter of equity.

Perhaps it would be sufficient to dispose of the demurrer, by referring to the rule (*Laight* v. *Morgan,* 1 Johns. Cases, 429), that if a demurrer be general to the whole bill, and be bad in part, it must be overruled. If it be good for discovery, and not for relief, a general demurrer to the whole bill is bad. The defendants should in such a case give the discovery, and demur to the relief; and this rule was so settled, in the case referred to, in the Court of Errors. I cannot see any doubt, in this case, of the right of the plaintiffs to a discovery concerning the deeds charged in the bill to have been lost, and concerning their contents.

But the bill appears to me to state several distinct and sufficient heads of equity jurisdiction.

It is easy to perceive, that the real ground of the claim of the defendants, as heirs of Vredenbergh, rests on the defective conveyance from him to John Carpenter, under whom the plaintiffs claim title; and that defect consists in the omission of words of inheritance, the want of which, I apprehend, would confine the operation of the assignment, in a Court of law, to an estate for life. But when the right of the soldier rested originally in equity, and continued so when he conveyed his right to Smith, and when Smith transferred that right to Vredenbergh, and when we consider the charge in the bill that Vredenbergh and Carpenter negotiated and agreed for the sale and purchase of that entire right, and the circumstances attending the assignment from V. to C., and the language and mode of the assignment, and the accompanying delivery of the patent and original discharge of the soldier,

there is good cause to infer a mistake in that assignment; and that, owing to a defect in drawing it, the intention of the parties was not carried into effect. To remedy this defect, and to prevent an unconscientious advantage being taken of it, may afford a very fit case for equitable interposition. Under such special circumstances, a trust in fee may be considered as created, which this Court would execute according to the conscience and intention of the parties. There are many cases at common law in which a fee has been held to pass without the word heirs (Co. Litt. 9. b.); and if a trust interest in fee *was intended* to be created by the assignment from V. to C., in like manner as a trust interest in fee *was conveyed* by the deed from Elliot to Smith, and by the assignment from Smith to Vredenbergh, then this Court, according to the doctrine in *Fisher* v. *Fields* (10 Johns. Rep. 495), would decree an adequate legal conveyance, according to that intention, notwithstanding the want of words of inheritance.

The allegations in the bill on which so much stress has been laid by the counsel for the defendants, that the plaintiffs were seised of the land in question, must be understood to mean an equitable, and not a legal seisin. The whole scope of the bill, and the very fact of coming into this Court, demonstrate this meaning.

The bill also states facts, from which we are to infer that Vredenbergh and his heirs, the present defendants, are equitably estopped from asserting any claim to a reversionary interest in the land. It is charged, that V., after the death of Carpenter, for 13 years, stood by and saw great and costly improvements made upon the land, by persons claiming, and believing themselves to be owners in fee, under Carpenter, and never interposed any pretension of right or title. It appears from the cases referred to in *Wendell* v. *Van Rensselaer* (1 Johns. Ch. Rep. 354), that though the right of the party, who thus misleads third persons by his silence, be merely a reversionary interest, and subject to a life estate, in the very person whom he suffers to deal with the property as absolute owner, the rule of equity still applies, that he never shall be permitted to exercise his legal title against such person. He is bound, and all persons claiming under him, are bound, by his silence. This case is much stronger than ordinary ones of the kind; for here the silence was maintained for thirteen years, after the assumed life interest of Carpenter had terminated.

If Carpenter was bound to know the duration of his title, those who succeeded to the estate, after his death, were certainly encouraged and misled by the studied silence or express admissions of Vredenbergh; and the case as stated presents one of the strongest claims for the assistance of this Court against the assertion of a title under him by his heirs. It is to be traced up to imposition and fraud.

The demurrer must, therefore, be overruled with costs, and the defendant ordered to answer.

Order accordingly.

CHAPTER VI.

PROCEEDINGS ON BEHALF OF DEFENDANT [Continued].

Pleas: Defined, Nature and Office.

Harrison v. *Farrington, 38 N. J. Eq. 358. (1884.)*

Bill for relief. On plea in bar.

The Chancellor:

This matter comes before me on the hearing of the defendant's plea in bar. The bill states that John C. Johnson, the complainant's intestate, and the defendant were copartners up to the death of the former; that the complainant, after having repeatedly applied, without success, to the defendant for an account of the partnership affairs, received a statement from him which showed that there was due Johnson's estate from the partnership the sum of $14,578.85; that the complainant was entirely ignorant of the affairs of the partnership; that in the accounts the defendant fraudulently charged Johnson's estate with the amount of a note made by one William C. Miller, which the defendant ought to have required Miller to pay &c. &c., and that the complainant, by the false and fraudulent representations of the defendant, was induced to accept a smaller sum than the amount which appeared to be due by the statement. The defendant demurred to part of the bill and pleaded to the rest. The demurrer was overruled. 9 Stew. Eq. 107. The plea was also overruled (11 Stew. Eq. 1), with leave to amend. The defendant has amended the plea, and answered also in support of it. By the plea he pleads that an account was stated between him and the complainant, and negatives, by separate denials, supplemented by a general one, the charges of fraud made against him in the bill. His answer is to the same effect.

The complainant's counsel insists that the plea should be overruled on various grounds: First, because it is not duly verified; second, because it does not appear whether it is intended to cover the whole or only part of the bill; third, because the answer is to

the same matter as the plea, and so overrules it; fourth, because the plea is multifarious in separately negativing the various facts stated in the bill in charging fraud; fifth, because it does not show what the balance was that was found due on the alleged accounting.

The first objection cannot be entertained. The defendant has made the oath required by the statute that the plea is not interposed for delay, but in good faith. The old rule on the subject was that to a plea of matter *in pais* in bar the defendant must make oath that it is true. And it has been held that such oath is requisite, even though the bill pray an answer without oath. *Heartt* v. *Corning,* 3 Paige 566. But where the statute directs what the verification of the plea shall be, it must be assumed that no further or other verification is necessary. It may be added that a plea will not be overruled on the hearing for want of the requisite oath. The objection must be made on motion, on notice to take the plea off the files. 1 Dan. Ch. Pr. 688.

The objection that it does not appear whether the plea is to the whole bill or only to part of it, is not tenable. The plea states that it is to the "whole of said bill or to so much and such part of it as prays an accounting." The bill is, in fact, only a bill for an account. It is true there are also prayers for the payment of any balance that may be found due, for discovery and for relief generally, but these are only incidental and subordinate to the great object of the suit, which is the account, or consequent upon the attainment thereof, provided the result of the accounting shall be in favor of the complainant. But if it be conceded that the bill should not be considered as merely a bill for an account, the plea is evidently intended to go merely to the claim of the bill to an account. If that is properly to be regarded as the whole object of the bill, then the plea is to the whole bill; and if not, then it is a plea to so much and such part of the bill as seeks an account. It is very clear that the pleader intended to confine the plea to the demand for an account.

The next objection is that the answer is to the same matter as the plea. This objection is based on a misapprehension of the extent of the rule on the subject. The general rule is, that when the defendant, at the same time, sets up the same defence both by answer and plea in bar, the former overrules the latter. The reason is, that by interposing the plea, he claims that he ought not

to be required to answer, and yet at the same time, does answer. But where, as in the present case, the bill anticipates the bar and alleges facts to avoid it, an answer is necessary, *in subsidium,* to support the plea. In such case, it is proper not only that the plea should contain all necessary averments to overthrow those allegations, but the defendant must support his plea by an answer, also denying those allegations. *Ferguson* v. *O'Harra,* 1 Pet. C. C. 493. "A plea should be drawn," says Professor Langdell, " in the same manner, whether it requires the support of an answer or not, *i. e.,* if it is a defence to the whole bill, it should be pleaded to the whole bill, and then the answer should give such discovery as the plaintiff is entitled to for the purpose of trying the truth of the plea." Lang. Eq. Pl. § 105. See, also, Mitf. Ch. Pl. 244, 298; Story Eq. Pl. § 684. The answer in this case is, according to the statement in the beginning of it, in aid of the plea, and "to give the complainant the discovery he is entitled to touching and concerning the matters in the bill alleged and charged in avoidance of the plea." It is urged that the conclusion of the answer, the general denial of combination and confederacy, and the general traverse are evidence of the general character of the answer, and that it is intended to go to the whole bill. The insertion of the conclusion referred to is contrary to the rule of this court which requires that it be omitted. It has no significance, however, in favor of the objection under consideration.

It is also urged that the answer is not sufficient, in that it does not answer all of the bill which is not covered by the plea. I see no ground for sustaining this objection. The scope of the bill has already been adverted to, and if the complainant is barred from an account, his claim to relief wholly fails.

The next objection is that the plea is multifarious, because it negatives the various facts stated in the bill in charging fraud. The objection is not well taken. The charges in the bill to support the allegation of fraud, must be met in the plea. Mitf. Ch. Pl. 240, 271. They may be met by a general denial (no matter how general), provided it be sufficient to put the charges of fraud contained in the bill in issue. Mitf. Ch. Pl. 244. It is no ground of objection that the denials are explicit and particular. *Bogardus* v. *Trinity Church,* 4 Paige 178, 195. They merely put the fraud in issue.

It remains to consider the objection that the plea does not state

the balance found to be due on the accounting. It is laid down as a requisite to a plea of account stated in equity, that it set forth what the balance was. Beam. Pl. Eq. 230. In the case in hand, the plea makes no statement on that head. The bar set up in the plea is, in fact, not the accounting but the executed agreement, for the purchase, by the defendant, of the interest of the complainants invested in the assets of the firm. Hence, the amount of that interest, according to the accounting, is not stated, nor is it stated that it was ascertained thereby. The plea is silent as to the result of the account. Nor does it even state what amount the defendant agreed to pay the complainant for the interest of his intestate in the property of the firm. It states that they accounted and that the complainant urged the defendant to buy the interest of his intestate, for the sum of $10,000, and as an inducement, offered to allow him the amount of a note of $262.72, made by Samuel Thompson and held by the firm, and to waive the interest on the notes to be given in payment, and that "a memorandum of that agreement was then and there drawn in writing, in words and figures following:

"NEW YORK, Aug. 10th, '76.

"It is agreed between the undersigned that the interest of the estate of John C. Johnson, deceased, in the late firm of John C. Johnson & Co., shall be settled for the sum of $10,000, less the amount of Samuel Thompson's note—$262.72.

"$10,000 00
"262 72

"$9,737 28

"To be settled by notes as follows: [then follows a statement of notes], said notes to be without interest."

It is not stated that this instrument was signed by anybody. The plea adds that the complainant afterwards agreed to allow, as a "further payment thereon," another claim, which is specified, thereby reducing the amount to be paid to $9,582.28; that an attachment was issued out of the supreme court of New York, at the instance of creditors of the estate of the intestate, against the complainant, and served on the defendant, and that a notice was served on the latter, by the public administrator of the city of New York, "claiming said assets and forbidding the payment

of said moneys to said complainant"; that on the 10th of July, 1878, the complainant sued the defendant in the circuit court of Essex county, in this state, for "said balance of $9,582.28," and obtained judgment therein against the defendant on the 31st of August following, which the latter paid on the 6th of December following, and the complainant gave him a warrant (which is set out) for the satisfaction of the judgment. The plea does not allege that the complainant ever agreed to take $10,000, or $9,737.28, or $9,582.28, for the interest of his intestate in the partnership property. It may be gathered from it that the pleader intended to say that he agreed to take the last-mentioned sum for it, but he has not done so. He says (to restate it) that the complainant urged the defendant to give $10,000, and as an inducement agreed to allow him the Thompson note; that a memorandum of that agreement (but it does not say that the defendant agreed to take the interest and pay any sum for it) was drawn (it does not even state that it was signed); that the complainant afterwards agreed to allow, as a further payment thereon, another claim, thereby reducing the amount to be paid to $9,582.28, and that the complainant sued the defendant for that sum and recovered judgment, which the defendant paid. A plea must clearly and distinctly aver all the facts which are necessary to render it a complete equitable defence to the case made by the bill. This plea is defective, as has just been shown; it will therefore be overruled, with costs.

Heartt v. Corning, 3 Paige Ch. (N. Y.) 566. (1832.)

This was a bill filed by Heartt, the surviving partner of the firm of Heartt & Smith, against the executor of Smith for an account and settlement of the copartnership concerns. The bill stated that in September, 1804, Heartt & Smith entered into copartnership, in the hardware business, to commence on the first of January thereafter; that Heartt was expected to furnish the principal part of the capital, and that Smith was to take the whole charge of keeping the books and accounts of the firm, and was to make up and state the copartnership accounts annually on the first of January in each year; that the partners were to be allowed interest on the amount of stock furnished by them respectively, to be computed annually on the first of January, and carried into

the accounts; and that Heartt was to receive two thirds of the profits of the business, and Smith one third. The bill further stated that the partnership continued until the first of April, 1812, when it was dissolved by mutual consent, and that Smith died in March, 1826; that from the commencement of the copartnership, Smith took the sole charge of the books, notes and accounts of the firm; that complainant did not, during continuance of the copartnership, nor until after the death of Smith, inspect the books of the firm, or know the contents thereof; and that he was not acquainted with his own and his partner's accounts, kept in the books, except from the postings in the ledger; that there were no annual statements made of the demands or accounts of either of the partners, and no annual inventories were taken of the stock, demands, or property of the firm; and that there had never been any statement or settlement of accounts of the copartnership concerns made by or between the partners. It was further alleged in the complainant's bill, that during the continuance of the copartnership, and afterwards, Smith had received large sums of money belonging to the firm, which he had not entered upon the books of the company, but had appropriated the same to his own use; that he had subscribed for and purchased stocks, in the Bank of Troy and other incorporated companies, in the name of the firm, and in his own name, and had paid for the same with the partnership funds; that he had afterwards appropriated the stock to his own use, without the assent of the complainant, and had received the dividends thereon; that during the continuance of the copartnership, Smith loaned the partnership funds without interest and against the will of the complainant, by which large sums were lost; and that he had also used the name of the firm in endorsing for the accommodation of various individuals, by which the partnership was made liable, and sustained losses. The complainant also claimed to be credited for the hire of a store, for the keeping and hire of a horse and carriage for the use of the firm, and for boarding clerks; and also for large sums of money belonging to the complainant, alleged to have been received and appropriated for the purposes of the company, and not credited on the books of the copartnership. The complainant waived an answer from the defendant on oath, under the provision of the revised statutes, and in conformity to the 40th rule of the court.

To all that part of the bill which related to errors in the books

of the company, by supposed improper credits to Smith, or by the neglect to make proper charges against him, or to the neglect to give all proper credits to the complainant, and to that part which sought to charge Smith with the losses upon moneys loaned or endorsements made for the accommodation of other persons, or which related to the bank stock subscribed for or purchased by Smith with the funds of the firm, or which related to any other errors in the books of the company previous to the first of January, 1812, the defendant pleaded that Smith, on the first day of January, 1811, did cause the partnership accounts of the firm, as between the company and the complainant, and as between it and the defendant, from the commencement of the partnership up to and including the first day of January, 1811, to be made and stated in the ledger of the company, and caused the balance to be ascertained and struck in the several accounts of the said partners, under that date; which balances were then carried to the new accounts of the partners respectively for the succeeding year, kept in the ledger, as by reference to the accounts so stated, balanced and settled on the ledger fully appeared. And also that the complainant and Smith, on the first of January, 1812, caused the partnership accounts as between the partners respectively and the company, from the first of January, 1811, up to and including the first of January, 1812, to be made and stated upon the ledger; that a balance of $5,432.11 was found due from the partnership to the complainant, and of $3,127.35 to Smith; and that the balances were struck in the accounts so stated and settled, and were carried by the parties to the new accounts kept in the same ledger. And that the schedules A. and B. annexed to the plea were true copies of the accounts as stated on the ledger, and that the schedules of C. D. contained the items and particulars of those accounts, from the other books of the firm, as referred to in the accounts so stated, balanced and settled on the ledger. The plea also averred that the accounts so stated, balanced and settled were just and true to the best of the defendant's knowledge and belief; that the complainant, from the commencement of the copartnership, had at all times had free access to the ledger, and all the other books of the firm, and was well acquainted therewith and with the matters therein contained; and that he always acquiesced in the justice and accuracy of the several accounts from the times of the statement and settlement thereof until at or about the time of the death of

Smith, in 1826. The defendant put in an answer to the rest of the bill; but as the complainant had waived an answer on oath, the plea and answer were not sworn to by the defendant. And the cause was brought to hearing, upon the plea, in the usual form.

THE CHANCELLOR:

It is necessary in the first place to dispose of a question of form, as to the verification of the plea. The complainant having waived an answer on oath, the defendant's counsel supposed the waiver extended to the plea, which in this case is connected with the answer, as the plea covers only a part of the bill. A plea for some purposes may be considered a special answer. And for this reason it has been held that the defendant might put in a plea to the whole bill, under the usual order for time to answer, although the defendant in such a case is not permitted to demur. (2 Dicken's R. 554. 1 Grant's Pr. 166. 1 Brown's Ch. Pr. 356.) But it is not an answer within the meaning and intent of the statute under which this complainant has waived an answer on oath. A plea was never considered as evidence in behalf of the defendant, as to the facts stated therein, so as to require the testimony of more than one witness to contradict it, even where it negatived a material averment in the bill. The object of the statute (2 R. S. 175, § 44) was to prevent the complainant from being concluded by the answer of the defendant, in a case where he was compelled to come into this court for relief, but in which he did not need a discovery, and where he was unwilling to permit the defendant to be a witness in his own favor, by the forms of pleading. Bills filed under this new provision in the revised statutes, are strictly bills for relief only, and not bills for discovery and relief. Hence, in a case which is proper for a plea, as the complainant is not entitled to a discovery, it cannot be necessary for the defendant to support his plea by an answer, as he must do in most cases where the answer on oath is not waived. A plea to a bill of this description can seldom be necessary, as the answer cannot be excepted to for insufficiency; and the defendant may set up any matter of defence in the answer. But where the defendant finds it necessary or expedient to resort to this mode of defence, to prevent the trouble and expense of a protracted litigation, he must conform to the former practice of the court, so far as to verify the allegations and averments in his plea by oath, in the usual form. In a case

of this kind, however, where the negative averments in a plea of an executor relate to transactions in the life time of the testator, or to acts done by others, it is sufficient if the averments are made upon the defendant's belief only; and they need not be sworn to positively. (*Drew* v. *Drew*, 2 Ves. & Beame, 160.) The averments in this plea were therefore correct in point of form; but the plea should have been put in upon oath in the usual manner.

The complainant, however, is wrong in supposing that this is an objection which he can take advantage of at the hearing as to the sufficiency of the plea. As well might he object, at the hearing, that a plea or demurrer wanted the signature of counsel. The proper mode of taking advantage of a formal defect of this description, is by an application for an order to set aside the pleading, or to take it off the files for irregularity. The case of *Wall* v. *Hubbs*, 2 Ves. & Bea. 354, referred to by the complainant's counsel on the argument, shows such to be the practice. The application there was, to take the plea off the files; and the only question was, whether the complainant was not too late in making the motion, after he had entered an order, in the register's office, setting down the plea for argument. The application would have been wholly unnecessary in that case, if the want of a proper verification would have been a sufficient ground for overruling the plea on the hearing. If a plea or answer was taken off the files for irregularity, on the ground that it had not been properly sworn to, the defendant, as a matter of course, would have the right to file a new one, properly verified. But if a plea is overruled on the hearing, the defendant cannot have the advantage of his plea without special leave from the court to amend. The case of *Wall* v. *Hubbs*, merely decided that the complainant, by taking a step in the cause after the irregularity accrued, was not precluded from making a motion to take the plea off the files of the court. But where, with full notice of the irregularity, he brings on the argument of the plea without asking to have it taken of the files, he is not entitled to have it overruled as an insufficient defence, if in other respects it is well pleaded. In the case of *Beach* v. *The Fulton Bank*, 2 Paige's Ch. R. 307, 6 Wendell's Rep. 36, S. C., although an answer had been put in without oath, as to one of the defendants, and was therefore irregular, it was held that both parties were precluded from making any objection to the answer after a replication had been filed, and the proofs had been taken in the

cause. And Chief Justice Savage there held that the complainants would have been precluded from objecting to the answer on the ground of the irregularity, by the filing of a replication thereto after notice of such irregularity. (See also, *Riky* v. *Kemmis,* Beatty's Ch. Rep. 322.)

Upon the merits of the plea, if it turns out to be true in point of fact, my present opinion is, that it will be sufficient to prevent the parties from going into a general account of the partnership transactions, as between the copartners, previous to the first of January, 1812. The late chief baron of the exchequer in England, in a recent case, *The Attorney-General* v. *Brooksbank,* 2 Young & Jerv. R. 42, expressed an opinion that an account stated must be actually signed by the parties to enable the defendant to plead it in bar to a suit for an account; although he seemed to suppose an account not signed might be a good defence if set up in the answer and proved at the hearing. That opinion is clearly not law; and it is directly opposed to that of Lord Hardwicke, in *Willis* v. *Jernegan,* 2 Atk. Rep. 252; where he says, in express terms, that it is not necessary that the account should be signed by the parties. (See also, *Jessup* v. *Cook,* 1 Halst. Rep. 436; *La Malaine* v. *Caze,* 2 P. A. Brown's Rep. 128.) As there is no statute, or rule of law which requires the signatures of the parties to an account stated and settled between themselves, to make it binding and obligatory, provided the fact of the settlement can be established by other proof, it cannot, upon any principle of pleading, be necessary to set out any particular species of evidence, in a plea in bar, to enable the defendant to avail himself of the stated account as a defence.

In the case under consideration it appears by the statement in the complainant's bill, that it was one of the stipulations in the agreement of copartnership that Smith should make up and state the partnership accounts, annually, on the first of January in each year. Under that stipulation, even if Smith made up and stated the accounts *ex parte,* in the absence of Heartt, it was the duty of the latter to look into them within a reasonable time, and to point out the errors, if any existed therein, or he must be considered as having acquiesced in the correctness of the accounts as stated on the books of the firm; to which books both parties had access during the existence of the copartnership. In stating the accounts of partners, as between themselves, the entries on the partnership books, to which both partners have had access at the time when those

entries were made, or immediately afterwards, are to be taken as *prima facie* evidence of the correctness of those entries; subject, however, to the right of either party to show a mistake or error in the charge or credit. And vouchers for the specific items can never be required except under very peculiar circumstances. Here the copartnership continued but a few months after the statement of the accounts on the first of January, 1812; and it is possible that some fact may be disclosed in the evidence which may render it proper to permit the complainant to surcharge or falsify the account, as stated on that day for the preceding year, at least. But this cannot be done if the plea is now allowed as a conclusive bar against opening the account. I therefore think this is a proper case for saving the benefit of the plea to the defendant until the hearing.

An order must be entered accordingly, directing the plea to stand over until the hearing of the cause; and saving to the defendant the benefit thereof at that time. In such a case neither party recovers costs against the other on the argument of the plea, unless the contrary is specially directed by the court. (1 Brown's Ch. Prac. 359.)

Farley v. *Kittson, 120 U. S. 303. (1887.)*

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

A brief abstract of the pleadings will help to make clear what is presented for decision upon this record.

The suit was brought by Farley to enforce an agreement by which he and the defendants Kittson and Hill agreed to purchase, for their joint and equal benefit, the bonds, secured by mortgages, of two railroads, of one of which he was receiver, by appointment of the court, and of the other of which he was the general manager, by appointment of the trustees named in the mortgages.

The bill alleged the making of the agreement; that its object was, by means of the bonds so purchased, to purchase the railroads at sales under decrees of foreclosure in suits then pending; that it was agreed that Kittson and Hill should conduct the negotiations for procuring the necessary funds and purchasing the bonds, and

the plaintiff should furnish such facts, information and advice, and render such assistance, from time to time, as should be required of him; that the plaintiff had knowledge, not possessed by the other parties, as to who held the bonds and at what rate, and how they could be procured, and as to the nature and value of the railroads, and as to the pending suits for foreclosure, and his services and coöperation were indispensable to the success of the enterprise; that he performed the agreement on his part; that Kittson and Hill obtained the requisite funds from other persons, and purchased the bonds from the bondholders through one Kennedy, the authorized agent of the latter, and afterwards purchased the railroads at sales under decrees of foreclosure; that pending the negotiations for the purchase of the bonds, the plaintiff informed Kennedy of his interest, and his connection with Kittson and Hill, in the project to purchase them; that the plaintiff at all times, to the best of his knowledge and ability, gave full and true answers and information to all inquiries made by Kennedy, or by any of the trustees or bondholders, or by any person interested in the property under his charge as receiver and as manager, and kept Kennedy fully informed of all matters coming to his knowledge affecting the property, and in all things acted honestly and in good faith towards all persons interested in it; that Kittson and Hill had organized a new corporation, which was joined as a defendant; and that the defendants had thereby obtained a great amount of property and of profits, and had refused to account to the plaintiff for his share. The bill prayed for a discovery, an account, and other relief.

The individual defendants filed a plea, which, on the motion of the defendant corporation, was ordered to stand as its plea also, consisting of three parts:

First. A restatement in detail of some of the facts alleged generally in the bill.

Second. Averments that the plaintiff never informed Kennedy or any of the bondholders of his interest in the project for purchasing the bonds and thereby acquiring the mortgaged property, as alleged in the bill; and that neither Kennedy nor the bondholders knew, suspected, or had any information or belief, that the plaintiff had or claimed to have any interest in the project, until after the foreclosure sales.

Third. Averments that the making by the plaintiff of the agree-

ment sued on, and his engaging in the enterprise of purchasing the bonds and thereby acquiring the railroads, were, as to that railroad of which he was receiver, unlawful, a breach of his trust as such receiver, and a fraud upon the bondholders and the court; and, as to the railroad of which he was general manager for the trustees under the mortgages, a breach of trust towards the trustees and the bondholders, and a fraud upon them; and that by reason of the fiduciary positions so occupied by him the plaintiff was not entitled to the aid of a court of equity to enforce the agreement or any rights growing out of it.

To this plea the plaintiff filed a general replication, and the hearing in the Circuit Court was upon the issue thus joined.

The pleader and the court below appear to have proceeded upon the theory that by a plea in equity a defendant may aver certain facts in addition to or contradiction of those alleged in the bill; and also not only, if he proves his averments, avail himself of objections in matter of law to the case stated in the bill, as modified by the facts proved; but even, if he fails to prove those facts, take any objection to the case stated in the bill, which would have been open to him if he had demurred generally for want of equity.

But the proper office of a plea is not, like an answer, to meet all the allegations of the bill; nor like a demurrer, admitting those allegations, to deny the equity of the bill; but it is to present some distinct fact, which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large. Mitford Pl. (4th ed.) 14, 219, 295; Story Eq. Pl. §§ 649, 652.

The plaintiff may either set down the plea for argument, or file a replication to it. If he sets down the plea for argument, he thereby admits the truth of all the facts stated in the plea, and merely denies their sufficiency in point of law to prevent his recovery. If, on the other hand, he replies to the plea, joining issue upon the facts averred in it, and so puts the defendant to the trouble and expense of proving his plea, he thereby, according to the English chancery practice, admits that if the particular facts stated in the plea are true, they are sufficient in law to bar his recovery; and if they are proved to be true, the bill must be dismissed, without reference to the equity arising from any other facts stated in the bill. Mitford Pl. 302, 303; Story Eq. Pl. § 697. That practice

in this particular has been twice recognized by this court. *Hughes* v. *Blake,* 6 Wheat. 453, 472; *Rhode Island* v. *Massachusetts,* 14 Pet. 210, 257. But the case of *Rhode Island* v. *Massachusetts* arose within its original jurisdiction in equity, for outlines of the practice in which the court has always looked to the practice of the Court of Chancery in England. Rule 7 of 1791, 1 Cranch, xvii, and 1 How. xxiv; Rule 3 of 1858 and 1884, 21 How. v, and 108 U. S. 574. And the case of *Hughes* v. *Blake,* which began in the Circuit Court, was decided here in 1821, before this court, under the authority conferred upon it by Congress, had established the Rules of Practice in Equity in the Courts of the United States, one of which provides that "if upon an issue the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him." Rule 19 in Equity of 1822, 7 Wheat. xix; Rule 32 in Equity of 1842, 1 How. li. The effect of this rule of court when the issue of fact joined on a plea is determined in the defendant's favor need not, however, be considered in this case, because it is quite clear that at a hearing upon plea, replication and proofs, no fact is in the issue between the parties but the truth of the matter pleaded.

In a case so heard, decided by this court in 1808, Chief Justice Marshall said: "In this case the merits of the claim cannot be examined. The only questions before this court are upon the sufficiency of the plea to bar the action, and the sufficiency of the testimony to support the plea as pleaded." *Stead* v. *Course,* 4 Cranch, 403, 413. In a case before the House of Lords a year afterwards, Lord Redesdale "observed, that a plea was a special answer to a bill, differing in this from an answer in the common form, as it demanded the judgment of the court, in the first instance, whether the special matter urged by it did not debar the plaintiff from his title to that answer which the bill required. If a plea were allowed, nothing remained in issue between the parties, so far as the plea extended, but the truth of the matter pleaded." "Upon a plea allowed, nothing is in issue between the parties but the matter pleaded, and the averments added to support the plea." "Upon argument of a plea, every fact stated in the bill, and not denied by answer in support of the plea, must be taken for true." *Roche* v. *Morgell,* 2 Sch. & Lef. 721, 725-727.

The distinction between a demurrer and a plea dates as far back as the time of Lord Bacon, by the 58th of whose Ordinances for

the Administration of Justice in Chancery, "a demurrer is properly upon matter defective contained in the bill itself, and no foreign matter; but a plea is of foreign matter to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed or excommunicated, or there is another bill depending for the same cause, or the like." Orders in Chancery (Beames's ed.) 26. Lord Redesdale, in his Treatise on Pleadings, says: "A plea must aver facts to which the plaintiff may reply, and not, in the nature of a demurrer, rest on facts in the bill." Mitford Pl. 297. And Mr. Jeremy, in a note to this passage, commenting on the ordinance of Lord Bacon, observes, "The prominent distinction between a plea and a demurrer, here noticed, is strictly true, even of that description of plea which is termed negative, for it is the affirmative of the proposition which is stated in the bill"; in other words, a plea, which avers that a certain fact is not as the bill affirms it to be, sets up matter not contained in the bill. That an objection to the equity of the plaintiff's claim, as stated in the bill, must be taken by demurrer and not by plea is so well established, that it has been constantly assumed and therefore seldom stated in judicial opinions; yet there are instances in which it has been explicitly recognized by other courts of chancery, as well as by this court. *Billing* v. *Flight,* 1 Madd. 230; *Steff* v. *Andrews,* 2 Madd. 6; *Varick* v. *Dodge,* 9 Paige, 149; *Phelps* v. *Garrow,* 3 Edw. Ch. 139; *Rhode Island* v. *Massachusetts,* 14 Pet. 210, 258, 262; *National Bank* v. *Insurance Co.,* 104 U. S. 54, 76.

It only remains to apply these elementary principles of equity pleading to the case before us.

The averments in the first part of the plea, restating in detail some of the facts alleged in the bill, were admitted by stipulation of counsel in writing to be true, and no controversy arose upon them.

The substance of the averments in the second part of the plea was that neither Kennedy, nor the bondholders whose agent and representative he was, had any notice or knowledge that the plaintiff had or claimed to have any interest in the project set forth in the bill, until after the sales of the railroads under decrees of foreclosure. The matter of fact thus averred was put in issue by the replication. The testimony of the plaintiff (in connection with Kennedy's letter to him), which was uncontradicted, and was the only evidence upon the matter pleaded, shows that Kennedy, be-

fore the completion of the sale and purchase of the bonds, knew that the plaintiff was to have an interest in the project, although he may not have known the extent of that interest, or that it had been already acquired. The want of any notice to Kennedy and the bondholders, averred in the plea, was thus disproved.

The plea, indeed, is supported by the affidavit of one of the defendants that it is true in point of fact. But the oath of the party to its truth in point of fact is added only for the same purpose as the certificate of counsel that in their opinion it is well founded in matter of law, in order to comply with the 31st Rule in Equity, the object of which is to prevent a defendant from delaying or evading the discovery sought, without showing that the plea is worthy of the consideration of the court. *Ewing* v. *Bright,* 3 Wall. Jr. 134; *Wall* v. *Stubbs,* 2 Ves. & B. 354. An answer under oath is evidence in favor of the defendant, because made in obedience to the demand of the bill for a discovery, and therefore only so far as it is responsive to the bill. *Seitz* v. *Mitchell,* 94 U. S. 580. But a plea, which avoids the discovery prayed for, is no evidence in the defendant's favor, even when it is under oath and negatives a material averment in the bill. *Heartt* v. *Corning,* 3 Paige, 566.

The allegations of the bill, that the plaintiff at all times, to the best of his knowledge and ability, gave full and true answers to all inquiries made by Kennedy or any of the trustees or bondholders, or any person interested in the property under his charge as receiver and as manager, and in all things acted honestly and in good faith towards all persons interested in it, were not denied by the plea, and therefore, for the purposes of the hearing thereon, were conclusively admitted to be true. So much of the plaintiff's testimony, as tended to show that he intentionally concealed his interest from the stockholders and from the court, was outside of the averments of the plea, and therefore irrelevant to the issue to be tried.

The plaintiff having neither moved to set aside the plea as irregular for want of an answer supporting it, nor set down the case for hearing upon the bill and plea only, but having replied to the plea, and the only issue of fact thus joined having been determined by the evidence in his favor, it is unnecessary to consider whether the averments of fact in the second part of the plea ought to have

been supported by an answer, or whether, if proved, they would have made out a defence to the bill.

The averments in the third part of the plea, that, by reason of the plaintiff's position as receiver and general manager of the railroads, his entering into the agreement sued on, and engaging in the enterprise of purchasing the bonds and thereby acquiring the railroads, were unlawful, and did not entitle him to the aid of a court of equity to enforce the agreement or any rights growing out of it, were averments of pure matter of law, arising upon the plaintiff's case as stated in the bill, and affecting the equity of the bill, and therefore a proper subject of demurrer, and not to be availed of by plea.

The result is, that the principal question considered by the court below and argued at the bar is not presented in a form to be decided upon the record before us; and that, for the reasons above stated, and as suggested in behalf of the plaintiff at the reargument, the plea was erroneously sustained, and must be overruled, and the defendants ordered, in accordance with the 34th Rule in Equity, to answer the bill.

Decree reversed, and case remanded, with directions to overrule the plea, and to order the defendants to answer the bill.

Spangler v. *Spangler, 19 Ill. App. 28. (1886.)*

ERROR to the Circuit Court of Jefferson county; the Hon. C. C. BOGGS, Judge, presiding. Opinion filed April 15, 1886.

WILKIN, J.:

At the December term, 1885, of the Circuit Court of Jefferson county, defendant in error filed his bill for divorce against plaintiff in error. This bill alleges that both parties reside in said Jefferson county. To this bill plaintiff in error filed a plea denying that defendant in error was at the time of filing his bill or since, a resident of Jefferson county, and averring that he was at that time and still is a resident of Washington county in this State. The plea concludes by demanding the judgment of the court whether she ought to be compelled to make any answer to the bill, etc. To this plea the defendant in error filed a general demurrer, which was sustained. The plaintiff in error failing to

answer further she was defaulted and on a hearing a decree was rendered in favor of the defendant in error. The only question presented for our decision is as to whether or not the court erred in sustaining the demurrer to the plea.

It was not proper practice to dispose of a plea in chancery on demurrer. Story's Equity Pleading, Sec. 697; Daniells' Chancery Pleading and Practice, Vol. 1, Sec. 4, p. 713; *Cochran et al.* v. *McDowell,* 15 Ill. 10; *Dixon* v. *Dixon,* 61 Ill. 324. The demurrer may, however, be treated as equivalent to setting the plea for hearing, and we shall so consider it. By Sec. 5, Chap. 40, R. S., it is expressly provided that divorce proceedings shall be had in the county where the complainant resides. The latter clause of Sec. 2, Chap. 40, of the statute of 1845, was the same. In *Way* v. *Way,* 64 Ill. 410, the Supreme Court say: "The language is imperative, and excludes the right to commence proceeding in any other county than the one in which the residence of the complainant is fixed." If the statute could, by possibility, be construed into a different meaning, this case effectually disposes of all that is said by counsel for defendant in error as to the right of a complainant to bring a bill for divorce in any other county than that in which he resides. The allegation in the bill that the complainant resided in Jefferson county was a material and necessary one, and the plaintiff in error unquestionably had the right to put it in issue. Counsel for defendant in error seem to maintain that this can not be done by plea, and in the argument confound this plea with a plea in abatement to the jurisdiction as at common law, objecting to the manner in which it concludes, and citing authorities as to the requisites of a plea at law. It scarcely need be suggested that pleas in equity are not to be determined by the rules of pleading at law and hence the authorities cited both as to the office and form of this plea have no application whatever. The plea in this case is not a plea to the jurisdiction, but a plea in bar. The same defense set up in the plea might have been interposed by answer, as was done in *Way* v. *Way, supra.* It may with equal propriety be done by plea. A plea to a bill in chancery is proper whenever the defendant wishes to reduce the cause, or some part of it, to a single point, and from thence to create a bar to the suit. Smith's Chancery Practice, Vol. 1, page 216; Story's Equity Pleading, Sec. 652.

Pleas in chancery are pure pleas and pleas not pure. Pleas not pure are sometimes called negative pleas—Ibid. Sec. 651. It was

formerly doubted whether a purely negative plea was a legitimate mode of defense in equity; but that doubt has been dissipated, and it is now firmly established that such a plea is good—Ibid. 668. In Sec. 652, *supra,* the author says: "The true end of a plea is to save to the parties the expense of an examination of witnesses at large." It would, therefore, seem to be eminently proper in this kind of proceeding, if the complainant did not reside in the county in which the bill was brought, such residence being a "prerequisite to the existence of the right to file the bill," as was said in *Way* v. *Way, supra,* to raise the question, by plea, and thus save the expense of a general hearing. We see no objection to this plea, either in form or substance, as a plea in bar to a bill in chancery. The court below erred in holding it bad, and the decree is reversed and cause remanded for that reason.

PENDENCY OF ANOTHER SUIT.

Radford v. *Folsom, 14 Fed. Rep. 97. (1882.)*

This cause is now before the court upon a plea to the bill interposed by the respondents, which is termed a plea in bar, but which, in effect, is a plea in abatement. The present bill is filed by George W. Radford, assignee in bankruptcy of Frank Folsom, against Jeremiah Folsom in his own right, Jeremiah Folsom, administrator of the estate of Sarah M. Folsom, deceased, and Adele, Florence, and George B. Folsom, minor heirs of said Sarah M. Folsom, who appear by J. B. Blake, their guardian; and in substance the bill avers that complainant is the owner of certain realty in the bill described, and prays that his title thereto may be confirmed and quieted as against the respondents, and that he may have a writ of possession. The plea sets forth that prior to the commencement of this proceeding, to-wit, in the year 1873, Frank Folsom, to whose rights his assignee, George W. Radford, was afterwards substituted, brought an action against Jeremiah Folsom and Sarah M. Folsom, in the circuit court of Pottawattamie county, Iowa, "for the same matters and to the same effect, and for the like relief and purpose as the now complainant doth by his present bill set forth; in which said action issue was joined, and the same is still depending in said honorable court, and is undisposed of." To this plea the com-

plainant interposes a demurrer, thus presenting the question whether an action pending in the state court of Iowa can be pleaded in abatement of a subsequent action commenced between the same parties in the United States court for the district of Iowa, for the same subject-matter and the same relief.

SHIRAS, D. J.:

The doctrine is now well settled that an action pending in a foreign jurisdiction cannot be pleaded in abatement of an action commenced in a domestic forum, even if there be identity of parties, of subject-matter, and of relief sought. *Smith* v. *Lathrop,* 44 Pa. St. 326; *Bowne* v. *Joy,* 9 Johns. 221; *Allen* v. *Watt,* 69 Ill. 655; *Insurance Co.* v. *Brune's Assignee,* 96 U. S. 588; *Stanton* v. *Embrey,* 93 U. S. 548. It is equally well settled that at law the pendency of a former action between the same parties, for the same cause and relief, in a court of the state in which the second action has been brought, will be cause of abatement if pleaded in the second action. *Insurance Co.* v. *Brune's Assignee,* 96 U. S. 588. In equity, the general rule is the same. Story Eq. Pl. §§ 736-741. In *Insurance Co.* v. *Brune's Assignee,* 96 U. S. 588, it is held that "the rule in equity is analogous to the rule at law," and the statements of Lord Hardwicke in *Foster* v. *Vassall,* 3 Atk. 587, is quoted approvingly, to-wit, that "the general rule of courts of equity with regard to pleas is the same as in courts of law, but exercised with a more liberal discretion."

The case of *Insurance Co.* v. *Brune's Assignee* further states the rule to be that "a bill in equity pending in a foreign jurisdiction has no effect upon an action at law for the same cause in a domestic forum, even when pleaded in abatement"; and further, "it has no effect when pleaded to another bill in equity"; that is to say, a bill pending in a foreign forum will not, if pleaded, abate a bill pending in a domestic forum.

The reasons usually assigned in support of this doctrine are that the court of the one state or county cannot judicially know whether the rights of the plaintiff are fully recognized or protected in such foreign state or county, nor whether the plaintiff can enforce to full satisfaction any judgment he may obtain in the foreign tribunal; and further, that a court will not compel a plaintiff to seek his remedy in a foreign forum; or, as it is said by the supreme court of Connecticut in *Hatch* v. *Spofford,* 22 Conn. 485: "That country

is undutiful and unfaithful to its citizens which sends them out of its jurisdiction to seek justice elsewhere." None of these cases, however, meet the exact point presented by the plea interposed in the case now under consideration; for in all of them it will be found that the proceedings were pending in the courts of different states or circuits, whereas in this case the two proceedings are pending within the same state, but the one in the state and the other in the federal court. We do not find that this question has ever been finally settled by the supreme court of the United States, nor by the circuit court for this circuit.

In the case of *Brooks* v. *Mills Co.*, 4 Dill. 524, is found a full and able discussion of the question in the opinion of Judge Love, both upon principle and authority, with a review of the decision of Mr. Justice Clifford in *Loring* v. *Marsh*, 2 Cliff. 322; and the evils resulting from permitting parties to litigate the same subject-matter in two courts exercising judicial power within the same territorial limits, are very clearly and forcibly shown; and the conclusion is reached that "it would seem most rational and just that a plea in abatement should be allowed in order to avert consequences so mischievous." The judgment of the court, however, in that cause was placed upon another ground; the plea in abatement being overruled for the reason that it appeared upon the face of the plea that the parties to the suit in the state court were not the same as the parties to the bill in the United States court, and the question now before the court, though discussed, was not authoritatively determined. To the report of this cause in 4 Dill. is attached a full note by the learned reporter, citing the leading cases on the general question; and it is therein stated that "it is clear that the foregoing cases do not go to the length of holding that the pendency of a prior suit in a state court is not a valid plea in abatement to a suit for the same cause, and between the same parties to an action, in a United States court sitting in the same state"; and the reporter further states that Mr. Justice Miller, in a case in the Minnesota circuit, "intimated his inclination to the opinion that where the parties are identical, and the scope of the subject-matter equally so, the pendency of a prior suit in the state court, within the territorial limits of the district where the second suit is brought in the federal court, may be properly pleaded in abatement, or, at all events, will operate to suspend the action in the latter"; but, as we understand the statement of

the reporter, this was not decided or ruled in the cause, so that, as already stated, the question remains an open one. As authorities bearing upon the question more or less directly, see *Earl* v. *Raymond,* 4 McLean, 233; *U. S.* v. *Dewey,* 6 Biss. 502; *Lawrence* v. *Remington,* Id. 44; *Smith* v. *Atlantic F. Ins. Co.,* 22 N. H. 21.

In this condition of the authorities, what is the conclusion that should be reached from a consideration of the reasons upon which is based the doctrine that under certain circumstances the pendency of a prior action may be pleaded in abatement of an action commenced in the courts of the same state? The reason for the rule that the pendency of a former action may be pleaded in abatement of a second action, is, that if the complaining party has already an action pending in which he can obtain full relief, there is no justification for harassing the defendant by a second action for the same subject-matter. If it should appear, however, that in the second action the plaintiff can avail himself of some legal or equitable advantage, not open to him in the first action, then a legal reason is shown for the bringing of the second action, and the pendency of the one would not ordinarily abate the other. This is the reason why, as a rule, the pendency of an action at law cannot be successfully pleaded in abatement of a suit in equity.

As is said in Story, Eq. Pl. § 742: "It can scarcely ever occur that the remedial justice and the grounds of relief are precisely the same in each court, for if the remedy be complete at law, that is an objection to the jurisdiction of a court of equity."

In the well-considered opinion of the supreme court of Connecticut in *Hatch* v. *Spofford, supra,* it is stated in substance, that while the pendency of a prior suit of the same character, between the same parties, brought to obtain the same end, is at the common law good cause of abatement, yet the rule is not one of unbending rigor nor of universal application, nor a principle of absolute law, but rather a rule of justice and equity, and that a second suit is not, as a matter of course, to be abated as vexatious, but all the attending circumstances are to be carefully considered, and the true inquiry is, what is the aim and purpose of the plaintiff in the institution of the second action,—is it fair and just, or is it oppressive?

If it appears that the former proceeding, whether at law or in equity, is pending in a foreign state or country, and in this respect the states of the Union are foreign to each other, this fact in itself determines the question adversely to the plea in abatement.

If it appears that the two actions are pending within the same state, and are both at law or both in equity, and are identical in parties, subject-matter and relief sought, then no necessity appears for the institution of the second proceeding, in which event it would clearly be oppressive upon the defendant, subjecting him to unnecessary costs, and in such case the pendency of the first should abate the second proceeding.

On the other hand, if the two proceedings are pending in the same state, between the same parties, and concerning the same subject-matter, yet the relief sought is different, as in cases of an action at law and suit in equity, when the pendency of the one should not ordinarily operate to abate the other; for the difference in the relief obtainable in the two jurisdictions constitutes a sufficient legal reason for the maintenance of both proceedings.

But it is urged that while the second of the rules as above given may be applicable to cases pending in courts of the same state, yet it is inapplicable when one case is pending in the state and the other in the federal courts for the same state, the argument being that the two jurisdictions are foreign to each other, and hence that the pendency of a suit in the one court cannot be pleaded in abatement of a suit in the other. It is true that the state and federal tribunals owe their origin to different sources, but when created and brought into action within the same territorial limits, can it be fairly said that there are two states or jurisdictions co-existing within the same limits, and yet foreign to each other, in the sense that Iowa is foreign to New York? The same statutory and common law is enforced by both tribunals, and it cannot be said that if a party is relegated to the state court for the enforcement of his rights, that he is thereby sent into a foreign state or country, whose laws and modes of proceeding are unknown or unfamiliar.

As we have already shown, the main purpose of the rule allowing the pendency of one action to be pleaded, under given circumstances, in abatement of a second, is to prevent a defendant from being unnecessarily harassed, and subjected to additional costs by two proceedings when one will fully protect all the rights of the plaintiff. Now, it is apparent that the cost and vexation caused to the defendant by the institution of the second suit is, to say the least, not lessened by the fact that it is brought in the federal while the first is pending in the state tribunal. The evil to be remedied is not obviated by the fact that the two proceedings are

pending in tribunals owing their origin, the one to the state, the other to the federal government, yet acting within the same territorial limits.

If it appears that the two proceedings, being between the same parties, and for the enforcement or protection of the same rights, will result in the granting of the same remedy, operative within the same territorial limits, then it would seem clear that the second is not needed to protect or enforce the plaintiff's rights, and as the defendant must of necessity be put to additional trouble and expense in defending the second action, it follows that he is thereby vexatiously harassed, and in such case he should be enabled to protect himself by causing the abatement of the second action. It is the duty alike of the state and the United States court to protect a defendant from unnecessary and vexatious litigation. If the first action is brought in the state and the second in the federal tribunal, or *vice versa,* it is the bringing of the second action that constitutes the oppressive and unnecessary act on part of plaintiff, and the corrective should be applied in the court whose jurisdiction is invoked oppressively and wrongfully. Again, the fact that the one action is pending in the state and the second in the federal court, instead of being a reason why the second should not be abated, is, on the contrary, a weighty argument for just the opposite conclusion; for if the two proceedings are allowed to proceed at the same time, there may arise all the difficulties from a conflict between the two jurisdictions, acting within the same state, which are so fully presented in the opinion in the case of *Brooks* v. *Mills Co.,* already cited.

Applying these principles to the case before the court, it follows that the demurrer to the plea must be overruled, for the demurrer admits the allegation of the plea that the former suit pending in the state court is for the same subject-matter, and to the same effect, and for the like relief and purpose, that is contemplated in the second proceeding; and if that be true, then in the absence of any showing justifying the institution of the second suit, as being needed for the full protection of complainant's rights, it would necessarily follow that the second suit was uncalled for, and therefore vexatious.

In the argument of the demurrer, it was urged that the second suit was necessary for the enforcement of plaintiff's rights, for the reason that the supreme court of the state had decided in the first

proceeding that the suit was prematurely brought, and hence should be dismissed. The effect of such fact cannot be considered on the demurrer, as it is not presented by the record, and the complainant, if he desires to urge the same as a reason justifying the bringing of the second suit, must bring the same to the knowledge of the court in the further progress of the cause.

McCRARY, C. J., and LOVE, D. J., concur.

ANSWER TO SUPPORT PLEA.

Bolton v. *Gardner, 3 Paige Ch. (N. Y.) 273. (1832.)*

The bill in this cause was filed by the administratrix of J. Bolton, deceased, to obtain the distributive share of the decedent in the estate of A. McLachlan, his half-brother. The bill charged that McLachlan died in January, 1819, leaving a large personal estate, and that the defendant D. Gardner, who married his sister, administered thereon: that in February, 1821, Bolton received a letter from the defendant S. S. Gardner, a brother of D. Gardner, requesting him to call and see him relative to the estate of McLachlan; that Bolton called accordingly, and S. S. Gardner told him he was entitled to some portion of the estate, and that as the agent of his brother, the administrator, he wished to settle it with him, and he referred him to S. Miller, the surrogate, for further information; that Bolton called on Miller, who advised him that he was entitled to about seven or eight hundred dollars out of the estate of McLachlan, but that, as the administrator was a liberal man, he thought it probable he would give him a thousand dollars: that Miller offered to undertake the business and obtain the money for him for a fee of $50, to which Bolton agreed: that a few days afterwards Bolton met Miller and S. S. Gardner, by appointment, at the office of the latter, where Bolton agreed to accept $1,000 for his share of the estate of McLachlan; and that he then executed a release or assignment of his interest therein to D. Gardner, on receiving $950, the remaining $50 being paid to Miller as his fee. The bill further charged that Bolton, at the time of executing the release and assignment, was wholly ignorant of his rights as one of the next of kin of McLachlan, and that he was also ignorant

that Miller was the counsel of D. Gardner, which he subsequently ascertained to be the case; that during the negotiation Bolton did not see any statement of the personal estate of McLachlan, nor was he informed of its value, or of his rights therein, either by Gardner or by Miller, but that he was induced to sign the release and assignment by the representations made to him by S. S. Gardner, the solicitor, and Miller, the counsel of D. Gardner: that if Bolton had known the amount of the personal estate of McLachlan, and of his interest therein, he would not have released such interest for $1,000, which the complainant averred was less than one-fifth of his just distributive share of the estate, and to which he was entitled as one of the next of kin. The complainant, therefore, insisted that the release and assignment were void, by reason of this fraud and imposition; and that she, as the personal representative of Bolton, was entitled to one-fourth of the personal estate of McLachlan, deducting therefrom the $950 received from Gardner. The bill further stated, that D. Gardner had not filed an inventory, and that he had refused to exhibit to Bolton in his lifetime, or to the administratrix since his death, an account of the estate: that at the time of executing the release and assignment, D. and S. S. Gardner and Miller well knew that $950 was not one-fifth of the distributive share of Bolton in the estate of McLachlan; that they then also knew that Bolton was ignorant of his rights, and of the proportion of the estate to which he was entitled; and they did not produce or show to him any statement or inventory of the estate. The bill prayed that the defendant D. Gardner might set forth an account of the personal estate of McLachlan which had come to his hands as administrator, &c., and of the administration thereof; and that he might be decreed to pay to the complainant the distributive share of such estate to which she was entitled, as the personal representative of Bolton; and for general relief.

The defendant D. Gardner, as to so much of the bill as sought for a discovery or account of the estate of McLachlan, and of the administration thereof, and as to all the relief sought by the bill, pleaded in bar the release and assignment executed by Bolton, in February, 1821. He averred in his plea that it was not true, to his knowledge or belief, that Bolton, at the time of executing the release, was wholly ignorant of his rights as one of the next of kin of McLachlan: that Miller was not at that time his counsel: that Bolton was, according to his belief, informed of the value of the

estate, and of his rights and interest therein: that the sum of $1,000 was not less than one-fifth of his distributive share of the estate to which he was entitled as one of the next of kin: that the release was not procured by the contrivance and management of S. S. Gardner and Miller, and by false and untrue representations: that it was not true that either the defendant S. S. Gardner, or Miller, knew, at the time of making the release, that $950 was not one-fifth of Bolton's share of the estate, or that it was far less than his distributive proportion thereof; or that they knew he was ignorant of his rights and of the proportion of the estate to which he was entitled. The defendant further averred in his plea, that he could not state whether S. S. Gardner and Miller produced and exhibited to Bolton any inventory or statement of the property at the time of the execution of the release; but that the defendant was informed and believed that S. S. Gardner did, at that time, state to Bolton and Miller the amount of the estate of McLachlan. There were also some other informal averments in the plea as to other matters stated in the bill.

The plea was accompanied by an answer, admitting most of the allegations in the bill relative to the original right of Bolton to a distributive share of the estate of McLachlan; and containing a general denial, according to the defendant's knowledge, information and belief, as to most of the circumstances stated in the bill, as evidences of fraud or imposition, to avoid the release. The defendant also denied, in his answer, that the sum of $1,000 paid to Bolton on the execution of the release, was less than one-fifth of his distributive share of the estate; and he alleged that, according to his belief, it was fully equal to what he was rightfully entitled to. He also alleged that he filed in the office of the surrogate an inventory of the estate of McLachlan, in February, 1819; which inventory he averred to be in all respects just and true, except that after the filing of the inventory, he received eleven volumes of books and $132.81, belonging to the estate, which came to his knowledge after the filing of the inventory. He also denied that Miller was his counsel at the time of the execution of the release; but admitted he had since been informed, and that he believed Miller, previous to that time, had, as his counsel, signed a plea put in by him, the defendant, to a bill filed by Jane Garness relative to the estate; but that the name of Miller was affixed to the plea without the knowledge or approbation of the defendant.

Upon argument before the late vice-chancellor of the first circuit, the plea was allowed; with liberty to the complainant to reply to the same within ten days, or in default thereof, that her bill be dismissed. From this decision the complainant appealed to the chancellor.

THE CHANCELLOR:

Several objections are made to this plea which are merely formal; but the principal objection is that it is pleaded in bar to the discovery of what the complainant's counsel considers a material fact to destroy the defence arising out of the release and assignment of Bolton. I believe the answer is sufficiently full as to all the matters of the bill not professedly covered by the plea. Whether the plea does not cover the discovery of some facts as to which the complainant was entitled to an answer, I shall presently consider. The rule which requires an answer in support of a plea, in certain cases, does not render it necessary that the defendant should deny positively, in the answer, matters of which it cannot be presumed he has any personal knowledge. Where fraud or other circumstances are charged for the purpose of avoiding a release, the defendant pleading the release, must by proper negative averments in his plea, deny the allegation of fraud, &c., and must support his plea by a full answer and discovery as to every equitable circumstance charged in the bill to avoid the bar. (Mad. & Geld. Rep. 64; 2 Ves. & Beam. Rep. 364.) But in the case of negative averments as to matters not alleged to be the act of the defendant, or where, from the nature of the case, he cannot be supposed to have any personal knowledge of the subject, it is sufficient for him to deny the facts charged upon his belief only. (*Drew* v. *Drew,* 2 Ves. & Beam. 159.) The defendant, however, must be careful so to frame his averments that the complainant may put the facts in issue by a replication. And where the negative averments in the plea are permitted to be made upon the belief of the defendant, it will be sufficient for him, in the answer in support of such plea, to deny the equitable circumstances stated in the bill, according to his knowledge, information and belief only.

One objection which is urged by the complainants' counsel, to the form of the plea in this case, is that some of the averments therein professing to negative the charges in the bill, are not direct and issuable, but are involved and argumentative. I am inclined

to think this objection is well taken. One of those averments commences thus: "And this defendant further avers, that for the reasons in his answer particularly set forth, he cannot say whether or not," &c., concluding with two or three involved exceptions, and embracing in a parenthesis another distinct averment of ignorance. This mode of denying an allegation in the bill might not perhaps be deemed objectionable in an answer, where every allegation, not admitted by the defendant, is put in issue by the formal traverse at the close of the answer. But it is bad in a plea where the negative averments must tender an issue directly.

Another objection to the plea is that it is overruled by a part of the answer. The defendant, by his plea, objects to answering any allegations in the bill which call for a discovery as to the situation or amount of the estate of McLachlan, which has come to his hands as administrator; yet he does answer in part as to those matters. He alleges, in substance, that the inventory filed by him in the office of the surrogate contains a just and true account of the estate which had come to his hands, except eleven volumes of books and $132, which came to his hands afterwards. He also states that the $1,000 paid Bolton at the time of making the release, was fully equal to what he was rightfully entitled to, and was not, as alleged in the bill, less than one-fifth of his just distributive share of the estate. If it was necessary or proper to put these allegations in an answer in support of this plea, then it was improper to plead the release in bar of the discovery as to the amount of the estate. The defendant should have pleaded in bar of the relief merely, and have given a full discovery as to the actual amount of the estate. If the allegation in the answer, that the amount paid to Bolton at the time of the execution of the release was not less than one-fifth of his distributive share of the estate, and that it was fully equal to what he was rightfully entitled to, was not necessary to support the plea, it overrules the whole plea and constitutes a double bar. (2 Sim. & Stu. R. 281.) Taking this answer to be true, Bolton received from the defendant his full distributive share of the estate, and all he had any right to claim. This of itself is a full defence to the suit, and to the whole relief asked for by the bill.

Independent of these objections to the plea, in point of form I think the complainant was entitled to a full discovery as to the actual amount of the personal estate of McLachlan. We have

before seen that the party pleading a release which the complainant seeks to impeach upon equitable circumstances, must, in his answer supporting the plea, make a full discovery as to every material circumstance relied on to avoid the bar. One equitable circumstance relied upon here is, that Bolton understood from Miller that his share of the estate was less than $1,000, whereas the complainant alleges it was more than five times that amount, and that this fact was then known to the defendant and his solicitor. If this was so, although Miller himself was probably misinformed as to the amount, I am not prepared to say that a trustee can be permitted to support a release from his *cestui que trust,* founded on such a gross inadequacy of consideration; although there was no actual fraud intended. I think, in such a case, the defendant should be required to show that the parties were treating for a settlement at arms' length, or that he gave the *cestui que trust* a fair statement of the amount of the property, so far as was necessary to enable him to act understandingly in relation to his rights. Although the defendant denies knowledge of the amount of property charged in the bill, the complainant has a right to know what the property was, and when it came to the defendant's hands, to enable the court to see whether the allegation is true.

I think the vice-chancellor erred in allowing this plea; and his decision must be reversed, with the costs of this appeal. The plea is to be overruled, but without prejudice to the right of the defendant to insist upon the release and assignment, in his answer, as a bar to the relief sought by the complainant's bill.

As the complainant is prosecuting her cause before the vice-chancellor in *forma pauperis,* the question whether she is to receive costs upon the argument of the plea before the vice-chancellor, must be reserved until the hearing; but they are not to be allowed if the defendant succeeds in his defence. This court will not encourage the prosecution of suits in *forma pauperis,* merely for the purpose of obtaining the costs of interlocutory proceedings, if there is no reasonable hope of succeeding on the merits. As the complainant cannot prosecute an appeal as a poor person, and is also obliged to give security for the costs of the adverse party in such a case, it is reasonable that she should recover *dives* costs for the proceedings on the appeal.

Goodrich v. *Pendleton, 3 Johns. Ch. (N. Y.) 384. (1818.)*

Phineas Miller, of Georgia, made his will, the 11th of December, 1797, appointing Decius Wadsworth, Samuel Kellock, and his wife, Catharine Miller, his executors, and died the 7th of December, 1803. The two executors first named declined to act, and the executrix administered, but did not take out any letters testamentary in this state. At the time of his death, the testator was a creditor of the United States to forty thousand dollars, and upwards, on a contract made for supplying the United States with ship timber. Some controversy having arisen between the executrix and the United States, relative to this debt, the defendant, professing great friendship for the executrix, who resided in Georgia, wrote her a letter, dated December 4, 1806, in which he takes notice of that debt, and expressed a belief, that if he were duly authorized, he could obtain the money from the United States, and he, at the same time, enclosed a power of attorney for her to execute. The executrix received the letter, executed the power of attorney, and returned it to the defendant. The power of attorney was dated January 30th, 1807, by which the executrix authorized the defendant to demand and receive of and from the United States, the debt above mentioned, being the balance of account as awarded by arbitrators, to give acquittances for the same, and to compound, if necessary, any controversy respecting it, so far as she, as executrix, might lawfully do. The executrix, afterwards, by a letter written by her agent, Ray Sands, from Georgia, to the defendant, requested him not to act under the power, which letter the defendant received prior to the 26th of March, 1807. The defendant, afterwards, in pursuance or under color of the power of attorney, on the 13th of January, 1808, received from the United States 18,328 dollars, 50 cents, for the balance due to the estate of the testator, and as attorney of the executrix, gave a discharge to the United States. The defendant paid over to the executrix 7,960 dollars, 11 cents, but retained the residue of the money so received by him, being 10,368 dollars, 39 cents, against her consent. The bill further stated that the sum so received by the defendant was less than the sum due from the United States to the estate of the testator, and less than could

have been obtained before giving the power to the defendant; that the sum actually received was by way of compromise, and which compromise the defendant was induced to make, not because he considered that sum as the full amount due, but with a view to obtain possession of it, and apply it to his own use. That the executrix, residing in Georgia, and the defendant in New-York, was unable to obtain the sum so withheld from her, by the defendant; though the sum so received by him was *as a trustee* for the estate of the testator, and he was liable to account for the same as such trustee. That the executrix died in Georgia on the 3d of September, 1814. That on the 9th of October, 1817, the plaintiff took out letters of administration, with the will annexed, in New-York. That the defendant refuses to account with the plaintiff, for the money so received, or to pay it; pretending that when he received the power of attorney as aforesaid, there was a debt due to him from the estate of the testator, and that it was agreed between him and the executrix, when he received the power, that he might retain the amount of his debt out of the moneys to be received by him. The plaintiff denied any such agreement; or, if it was ever made by the executrix, it was through ignorance of her duties, and from an undue confidence reposed in the defendant, who professed his desire, in soliciting the power, to promote her interest. That if any debt was due to the defendant, it was a simple contract debt unsettled, and that the estate of the testator was then indebted, by judgments and specialties, to more than the amount of all the assets, which the defendant knew; and the agreement, if made, would have been a *devastavit* in the executrix, &c. The bill prayed that the defendant might be decreed to account with the plaintiff, as administrator, with the will annexed, for the moneys so received by him from the United States, and to pay the same, &c.

The defendant, on the 13th January last, put in a *plea* and *answer*. For *plea*, he said, that every cause of action in the bill contained, accrued above six years before filing the bill. That after the cause of action (if any) arose, to wit, in June, 1808, the said C. M., the executrix, was in this state, and that she, by her will, appointed her daughter, Louisa Shaw, executrix, who proved the will in Georgia. That the sum of money (if any), received by the defendant, was not received *as trustee* for the estate of P. M., the deceased testator, or for C. M. as executrix, and, there-

fore, the defendant pleads the statute of limitations, in bar of the plaintiff's bill. That in support of the plea, and as to so much of the bill as charges that the money received by the defendant was received as trustee, for the estate of P. M., deceased, and that the defendant was, and is, accountable as trustee, he *answers,* and says, that he denies that the said money was received by him as trustee, but that the same was received by him on his own account, and retained by him, at the time of the receipt, for his own use (being applied by him for the payment of a debt justly due to him from P. M., in virtue of a special agreement between the executrix and him), and not as trustee.

The cause came on to be heard on the plea in bar and the answer in support of it.

THE CHANCELLOR:

This plea, with its attendant answer, is insufficient.

1. In the first place, it is multifarious, and contains distinct points. It states that the cause of action did not arise within six years, and that the plaintiff was barred by the statute of limitations; it also states, that the sole acting executrix of Phineas Miller, deceased, made her will, and appointed her daughter, Louisa Shaw, executor, and that the daughter had proved the will. This last point seems to be wholly unconnected with any fact forming the plea of the statute: if it meant any thing, it meant that the plaintiff was not entitled to the character he assumed, and that the suit ought to have been brought in the name of Louisa Shaw. No doubt, it may, in certain cases, be a good plea, that a plaintiff, who assumes to be administrator, was not entitled to that trust; and of this we have an example in *Ord* v. *Huddleston,* cited in Mitford's Pl. p. 189. But I do not mean to say, that the fact thus stated would, if it had stood by itself, have been a good plea. It is sufficient, however, for the present, to observe, that it is put forward in the plea, as a matter of defence, or it would not have appeared there, and the rule applies, that a plea containing two distinct points is bad. Such a defective plea was overruled by Lord Thurlow, in *Whitbread* v. *Brockhurst* (1 Bro. 404); and Lord Rosslyn afterwards observed (6 Vesey, 17), that he would not allow a plea of the statute of frauds, when it was coupled with another defence. Every plea must rest the defence upon a *single point,* and upon that point create a bar to the suit. Such is the

policy and convenience of pleading, and the party must resort to his answer, if he wishes to avail himself of distinct matters. It is fit and, salutary that a plea, which mixes together different and discordant matter, should be condemned; for it uselessly encumbers the record, and serves no other purpose than to produce confusion.

2. But I perceive a more important and stronger objection to the plea.

The defendant is charged as a trustee, and with a breach of his trust, and with fraud in the execution of it. These charges formed an equitable bar to the plea of the statute, and they ought to have been fully, particularly, and precisely, denied in the answer, put in as an auxiliary to the plea.

The bill contains the following charges, viz. that the testator, Phineas Miller, had a large demand against the United States; that the defendant, professing a friendship for Catharine Miller, the widow and sole acting executrix, and who resided in the state of Georgia, wrote her a letter, in which he takes notice of her demand, and expresses a belief that, if duly authorized, he could obtain the money for her, and, at the same time, enclosed to her a power of attorney to be executed and given to him; that under that solicitation she executed and sent him the power; that she afterwards wrote him a letter by her agent, requesting him not to act under that power, and which letter he received in March, 1807; that the defendant, acting under color of the power, in January, 1808, received from the United States 18,328 dollars and 50 cents, as for the balance due to the testator, which he received as such attorney and trustee, and in that character gave a discharge to the United States; that he, contrary to her consent and his duty, appropriated, of that sum, 10,368 dollars and 39 cents, to his own use; that he received the money upon a composition, made by him with the United States, and which he was induced to make, not because he considered the sum received to be the full amount due, but with a view to obtain possession of it, and to apply it to his own use, in discharge of some pretended unsettled debt by simple contract, alleged to be due to him from the testator; that the estate of the testator was indebted, by judgment and specialties, to more than all the assets, and which fact was well known to the defendant, and if the executrix had assented to any such appropriation, she would have committed a *devastavit,* which the defendant, from his professional knowledge, also knew.

Upon such a case, as stated by the bill, and not denied by the answer, I might well say, with Lord Hardwicke, in *Brereton* v. *Gamul* (2 Atk. 240), when he overruled a plea of the statute, as not being particular enough, that "the case was of such a nature as entitled the plaintiff to all the favor the Court could show her."

I need not stay to show that the defendant, being charged with a fraudulent breach of trust, as an agent or trustee for the executrix, cannot set up the statute of limitations, so long as the trust is admitted. A trustee cannot protect himself by the statute of limitations in a suit brought by the *cestuy que trust;* it would be a waste of time to look for authorities in support of a principle so well known and established. The only question that can now be made is, whether the defendant has sufficiently met and denied the charges in respect to the creation and breach of this trust. He contents himself with denying, in the plea, that the money received by him was received as trustee for the estate of Phineas Miller, deceased, and with denying, in the answer, that the money was received by him as trustee, and with averring that it was received on his own account, and retained for his own use, under some agreement not detailed. We have no denial of the letter professing friendship, and soliciting the appointment, nor any denial of the receipt of the letter from the executrix, suspending the power, nor of the subsequent receipt of the money from the United States, under a composition made in the injurious manner and for the unjust purposes stated; nor have we any denial that he gave the United States an acquittance or discharge, as attorney for the executrix. The defendant cannot be permitted to shelter himself under the statute, from the responsibility of such grave accusations, by a mere simple denial of the receipt of the money as trustee, while he leaves all those facts or charges uncontradicted which establish the existence of the trust, and show that he certainly *did receive* the money, as such agent or trustee. If such a general denial, without meeting specific charges, was sufficient, every trustee might escape from responsibility, by means of the statute, and be left to his own construction of what was intended by such a denial. But the rules of pleading are founded in better sense, and in stricter and closer logic; they require the defendant to answer, particularly and precisely, the charges in the bill, which go to destroy the bar created by the statute.

The rule is, that the equitable circumstances charged in the

bill, and which will avoid the statute, must be denied by the answer, as well as by the general averment in the plea; and the answer in support of the plea (and which is indispensable to its support) must be full and clear, and contain a particular and precise denial of the charges, or it will not be effectual to support the plea. The Court will intend that the matters so charged against the pleader, are true, unless they be fully and clearly denied. The facts requisite to render the plea a defence, must be clearly and distinctly averred, so that the plaintiff may take issue upon them; and the answer in support of the plea must contain particular and precise averments, to enable the plaintiff to meet them, as the object of the answer is to give the plaintiff an opportunity of taking exceptions to the traverse of the facts and circumstances charged in the bill, which, if true, would destroy the bar set up. These general principles of pleading are laid down in Lord Redesdale's Treatise of Pleading (p. 212. 214. 236, 237), a work of great authority on the subject: they are also to be met with in other treatises of established character. (Cooper's Eq. Pl. 227, 228. Gilbert's For. Rem. 58. Van Heythuysen's Equity Draftsman, p. 443.) They are, indeed, plain, elementary rules, which I should have apprehended could not well be mistaken by the equity pleader; but we will, for a moment, look into the cases in which they have been declared and applied.

In *Price* v. *Price* (1 Vern. 185), the defendant pleaded that he was a *bona fide* purchaser for a valuable consideration; but there being several badges of fraud stated in the bill, though the defendant in his plea had denied them, *yet, because he had not denied them, by way of answer, so that the plaintiff might be at liberty to except,* the plea was overruled. In *The South Sea Company* v. *Wymondsell* (3 P. Wms. 143), the bill charged fraud, and the defendant pleaded the statute of limitations, and denied the matters of fraud; *but as there were some circumstances not fully denied,* the defendant was ordered to answer the bill, with liberty to the plaintiff to except, and the benefit of the statute was to be saved to the defendant. In *Walter* v. *Glanville* (3 Bro. P. C. 266), sometimes referred to, to show, that if the matters charged are answered substantially, it will do, the only question was, whether the answer in support of the plea did not fully and particularly (as it did in that case) answer the material charges in the bill. The necessity of such an answer was evidently admitted by

the counsel, and by the Court; and so it must have been understood by Lord Ch. King, who made the decree appealed from, and who, subsequently, in the case cited from P. Williams, required such a full and particular answer.

Lord Hardwicke frequently noticed and supported these rules of pleading. Thus, in *Brereton* v. *Gamul,* already cited, the plea of a fine levied and of five years with non-claim was overruled, *as not being particular enough.* So, in 3 Atk. 70, *Anon.,* the bill charged, that since the death of the intestate, the administratrix had promised to pay the note as soon as she had effects, and the administratrix pleaded the statute of limitations, and that she made no promise. But the chancellor held the plea to be *too general,* as there was a special promise charged; and he ordered the plea to stand for an answer, with liberty to accept. Again; in *Hildyard* v. *Cressy* (3 Atk. 303), the defendant pleaded a fine and non-claim to a bill for a discovery whether the defendant were a *bona fide* purchaser, for a valuable consideration; and it appearing that the defendant had not made *a complete answer,* and therefore not properly supported his plea, the plea was ordered to stand for an answer, with liberty to except. In *Radford* v. *Wilson* (3 Atk. 815), the defendant put in a plea of a purchase for a valuable consideration, without notice; but as the instances of notice charged in the bill were particular and special, it was held that a general denial of notice was not sufficient, and that it must be denied as *specially and particularly as it was charged,* and the plea was overruled.

The modern cases before Lord Eldon contain the same rules.

Thus, in *Jones* v. *Pengree* (6 Vesey, 580), there was a plea of the statute of limitations, and an answer. The former was objected to as multifarious, and as not covering enough; and the answer was objected to as overruling the plea by answering to the very parts to which the plea went, and as not answering the material charge, which, if admitted, would have taken the case out of the statute. It was observed, upon the argument, that the *plea* ought to go to every thing, except the charges introduced into the bill to take the case out of the statute, and which it was necessary to *answer.* The plea was overruled as covering too much, and ordered to stand for an answer, with liberty to except; and though that case (as well as the one which followed) does not strike me as distinguished either for precision or clear distinctions, yet it is

important in this respect, that Lord Eldon adopts and approves of the rule, in the very words of Mitford, "that if any matter is charged by the bill, which may avoid the bar created by the statute, that matter must be denied *generally,* by way of averment in the plea; and it must be denied *particularly* and expressly, by way of answer to support the plea." The reason of the rule his lordship stated to be, that the plaintiff was entitled, by exceptions, to compel the defendant to answer precisely to all the cases put in the bill as exceptions to the statute. In the next case, of *Bayley* v. *Adams* (6 Vesey, 586), there was a plea of the statute of limitations, supported by an answer, and the decision was, that the plea was not sufficiently supported by the answer, because the charges in the bill were not sufficiently answered. There was a good deal of discussion in that case, on the point, whether the averments meeting the charges in the bill ought to be repeated in both plea and answer; and two decisions in the Exchequer (*Pope* v. *Bush,* and *Edmundson* v. *Hartley,* 1 Anst. 59. 97), which held, that if both plea and answer met and denied the same charges by the averments, the answer would overrule the plea, were much questioned. I need not now enter into that discussion; and even the Exchequer cases were declared to be confined to awards. It seemed to be admitted, throughout the case, that the *answer,* at least, must contain a full and particular denial of the charges; and perhaps the better opinion is, that a general denial will be sufficient in the plea.

The result is, that a plea of the statute is bad, unless accompanied with an answer aiding and supporting it, by a particular denial of all the facts and circumstances charged in the bill, and which form an equitable bar to the plea of the statute. The plea in this case has no such accompanying answer, and it must be overruled. The usual order in such cases is, that the plea stand for an answer, with liberty to the plaintiff to except; but in some of the cases the plea was declared to be overruled, and the defendant ordered to answer, saving to himself the liberty to insist on the statute in the answer. That is the better course in this case; for to order the plea to stand for an answer, with liberty to the plaintiff to except, would be prolonging the litigation, as we may take it for granted, from the palpable insufficiency of the plea as an answer, that the plaintiff would except, and the defendant be finally compelled to a fuller answer.

I shall, therefore, overrule the plea, with costs, and order the defendant to answer in six weeks, when he will still have the liberty of insisting on the benefit of the statute in his answer.

Order accordingly.

Souzer v. *De Meyer, 2 Paige Ch. (N. Y.) 574. (1831.)*

THIS was an appeal from a decretal order of the late vice chancellor of the second circuit. The defendants plead the statute of limitations to the whole bill, and at the same time put in an answer denying the whole equity thereof. The vice chancellor made an order, declaring, among other things, that the statute did not apply, and was no defence to the matters and charges contained in the bill; and for that reason he overruled the plea, with liberty, however, to the defendants to insist on the statute in their answer as a defence.

THE CHANCELLOR:

It is a well settled principle of equity pleading, that the defendant cannot plead and answer, or plead and demur, as to the same matter. If he pleads to any part of the bill, he asks the judgment of the court whether the matters of the plea are not sufficient to excuse him from answering so much of the bill as is covered by the plea. Therefore, if he answers as to those matters which by his plea he has declined to answer, he overrules the plea; and if he demurs to any part of the bill, and also puts in a plea, which is a special answer to the same part, the demurrer is overruled. If he is willing to give the discovery sought by the bill, and has any defence which might be pleaded in bar of the relief sought, he will have the full benefit of such defence, if he sets it up and insists upon it in his answer. This is always the better course, where the expense of a full answer will not be great; especially if there is any doubt as to his right to set up the particular defence by way of plea.

In some cases, where the complainant anticipates the plea, and sets up equitable circumstances in his bill to defeat the same, the defendant is not only permitted, but actually required, to support his plea by an answer as to those equitable circumstances. This, however, is only an exception to the general rule; and the answer

is not put in as a defence, but to give the complainant the benefit of a discovery to defeat the plea, which only contains a general denial of the equitable circumstances. Even in that case the plea does not profess to cover the *discovery* as to those particular allegations in the bill. If they are admitted, or not fully denied by the answer, it may be used, on the argument of the plea to counterprove the same. If they are denied, the complainant still has an opportunity to contradict the general denial in the plea, and the particular denial in the answer, by taking issue on the plea. And if the plea is falsified by the proofs, the complainant will not lose the benefit of his discovery as to the other matters in the bill, but may still examine the defendant on interrogatories, if a discovery is necessary. (Lube's Eq. Pl. 237, 335, 342. Mitf. 277, 302; 4 Lond. ed.) In the case now under consideration, the defendants have answered, as well as pleaded, to the whole of the charges in the bill, although no equitable circumstances were set up in anticipation of the plea. It is very evident, therefore, that this plea is overruled by the answer.

If the plea was bad in form only, but good in substance, as to the whole, or any part of the relief sought by the bill, and was not put in by the defendants in bad faith, the same should have been permitted to stand as a part of their answer, or they should have been allowed the full benefit of insisting upon the statute in their answer. But as the order has been drawn up in this case, although the defendants are to be permitted to insist upon the statute in their answer as a defence, it is somewhat doubtful, at least, whether they would not be precluded, on the final hearing, by the preceding part of the order, which declares that the statute is no defence to the matters and charges in the bill.

As to so much of the bill as seeks for a discovery and satisfaction of that part of the legacies which was not charged upon the land, I apprehend the statute would be a valid bar. The statute of this state having given a concurrent remedy in this court and in a court of law, to recover such legacies, it seems to follow that if the statute would be a good bar in an action at law for the legacy, it should be equally so on a bill filed in this court, for the same kind of relief. Whether the same principle would apply to the legacies chargeable on the land, after the defendants had subjected themselves to the payment thereof personally, or whether the complainants can call for an account for the period of twenty

years in analogy to the limitation of actions at law to recover the possession of real estate, are questions not necessary to be decided on this informal plea. Those questions can be discussed more profitable at the hearing, when all the facts are before the court.

I think the order of the vice chancellor should be so modified as to strike out that part thereof which declares that the statute does not apply, and is no defence to the matters and charges in the bill. So as to leave the whole question, as to the merits of that defence, open for discussion at the hearing, if the defendants think proper to amend their answer, and insist upon the statute as a bar to all or any part of the complainant's claim. The costs on this appeal must abide the event of the suit. And as the present vice chancellor of the second circuit was formerly counsel in the cause, the further proceedings in the case must be had before the chancellor; the defendants to have thirty days, after notice of this decision, to file a supplemental answer by way of amendment for the purpose of insisting upon the statute.

Dwight v. *Ry. Co., 9 Fed. Rep. 785. (1881.)*

WHEELER, D. J.:

The orators, who are stockholders to a large amount in the Vermont & Canada Railroad Company, and citizens of New York, New Hampshire, and Rhode Island, bring this bill in behalf of themselves and all other stockholders having like interests with them, not citizens of Vermont, Massachusetts, or Maine, against the directors of that corporation, citizens of Massachusetts and Pennsylvania, alleging that they refuse to take legal measures to protect the rights of the orators, and against the Central Vermont Railroad Company, in possession, and the Vermont Central Railroad Company, lessee of, and the other defendants, security-holders, claiming liens upon the Vermont & Canada Railroad, all citizens of Vermont, Massachusetts, and Maine, to recover the possession of that road for the Vermont & Canada Railroad Company.

The Central Vermont Railroad Company pleads that it is in possession as a receiver of the court of chancery of Franklin county, and of the state of Vermont, and the proceedings upon which its possession took place are set forth.

John Gregory Smith pleads that security-holders, of the same class as those made defendants, have brought proceedings in behalf of themselves, and all others like security-holders, against the Vermont & Canada Railroad Company, in the same court of chancery, to establish and enforce their security upon this road, in which a decision favorable to the validity of their lien has been made by the supreme court of the state, and which are now pending in the court of chancery to ascertain the amounts of, and facts concerning, the different classes of securities; and these proceedings are set forth.

Worthington C. Smith pleads that the Vermont & Canada Railroad Company brought a suit like this, and for the same relief, in the same court of chancery, and through its directors, by preconcert with the orators, discontinued the same that this suit might be brought to evade the proper jurisdiction of the state court, and confer a seeming, but unreal, jurisdiction upon this court, in pursuance of which this suit was brought; and denying that the directors have violated their duty, committed any breach of trust, or done otherwise than as requested by the orators.

Jed P. Clark pleads that the orators did not, before bringing this bill, in good faith request the directors to take legal measures to protect their rights, but that by the planning, suggestion, and request of the directors, and concert and arrangement made between them and the orators for the sake of escaping from the jurisdiction of the state court, to which the jurisdiction of right belonged, and to confer upon this court a seeming jurisdiction not real or of right, a simulated and unreal pretence of request and refusal were made, and that this suit is prosecuted by the Vermont & Canada Railroad Company, in the name of the orators, for the common benefit of them all, and denying that there has been any such refusal by the directors as amounts in legal effect to a breach of trust.

The Vermont Central Railroad Company sets out by plea that there were when this bill was brought, and are now, divers and sundry stockholders of the Vermont & Canada Railroad Company, citizens of Vermont, Massachusetts, and Maine, whose names are known to and ascertainable by the orators, and not by the defendant, and demurs to the bill for want of the necessary parties.

None of these pleas is supported by answer. All of them, and the

demurrer, have been argued. They may properly be considered in the inverse order of their statement.

The last one, that of the Vermont Central Railroad Company, is not in the proper form and sufficient, even if the fact that there were stockholders, citizens of Vermont, Massachusetts, or Maine, not invited to take part in the prosecution of the suit, would defeat it. In such cases the defendant should, at law, give the plaintiff a better writ, by setting out the name and identifying the party whose existence is alleged to create a fatal non-joinder, so that the plaintiff may traverse the allegation and form a definite issue to be tried, or discontinue and bring a new suit, joining the proper parties, upon the information given. The rules of pleading are the same in equity as at law, unless the reasons of them are varied by the different methods of procedure. There is no reason growing out of the proceedings in equity for varying this rule. The orators have the right to have the names of the stockholders, if there are any in those states whose existence would defeat the suit, set forth, so that they could traverse the existence of the persons or the fact of their being stockholders. They could not do that upon these allegations. There is no person named whom they may say is not a stockholder, or about whom they may say there is no such person. A traverse of the plea in its terms would put in issue what the orators know that the defendants do not know about the stockholders in those states. It would be quite singular if a suit should be abated at the instance of defendants on account of the supposed existence of persons whom they cannot name or identify. The want of such persons as parties is not likely to harm them. *Hotel Co.* v. *Wade,* 97 U. S. 13.

The pleas of Clark and Worthington C. Smith are to the same effect, and so nearly alike that they may well be considered together. They have been spoken of in argument as pleas to the jurisdiction of the court, or to the ability of the orators to bring suit, or as pleas in abatement otherwise; but, correctly speaking, they are not either. The orators and defendants are alleged in the bill to be citizens of different states. This fact gives the court jurisdiction of the controversy between them, and enables the orators to bring the suit, and to maintain it if they can establish their case. The refusal of the directors is a part of their case which they must establish, and not a fact on which the jurisdiction of the court, or their ability to sue, at all depends. If they can

establish the fact of refusal, together with the other facts necessary to make out a case for the relief asked, then they have a case on which they can rest; otherwise, not. They have the right to a full answer and discovery from the defendants as to their whole case, this part as well as the rest, unless there is some outside fact which would show that they have no right to maintain the suit at all; or some single fact on which the whole case depends is objected to by plea, and full answer and discovery are made to that part of the case. Pure and proper pleas in equity were such as set up some fact outside of the bill which would show that the bill should not be answered at all. These pleas required no answer to support them, for they would not be included in that which the party was called upon to answer. Anomalous pleas, denying a single part of the case, may, by the bill on which the whole case depended, come to be allowed, for convenience, to save trying the whole case, when the failure of that part would be fatal, and for safety against enforced discovery in a suit by those not in any manner entitled to the discovery; but, as the ground of the plea would be included in what the defendant was called upon to answer, he could not avoid the right to have at least that part answered by merely pleading to it. He must answer that, although the plea raising the objection and the answer supporting it might show that no answer to the rest of the case ought to be required. If this plea should be allowed, the orators would be deprived of the discovery on oath to which they are entitled, as to this part of the case, as evidence upon the traverse of the plea, if they should traverse it, as they would have a right to do. This would be contrary to sound principles and to authority. Story, Eq. Pl. § 372 *et seq.* These views are not contrary to the decision in *Memphis* v. *Dean,* 8 Wall. 64, cited and much relied upon in behalf of the defendants. There was an answer by the party pleading, as well as the plea, denying refusal of the directors to prosecute, and the cause appears to have been decided in both courts in chief, and not upon the plea alone.

The plea of John Gregory Smith depends solely upon the effect of the pendency of the suit in the state court of chancery in favor of himself and other security-holders, of which James R. Langdon is the foremost plaintiff in the title to the suit against the Vermont & Canada Railroad Company, through whose rights the orators here make claim. Doubts have been entertained by this court and some

others as to whether the pendency of a suit in a state or federal court in the same district might not be successfully pleaded to the further prosecution of a like suit in the other court, and this court inclined to the opinion that it could be. *Mercantile Trust Co.* v. *Lamoille Valley R. Co.*, 16 Blatchf. 324; *Andrews* v. *Smith*, 5 Fed. Rep. 833. But it now seems to be well settled that it cannot be. *Gordon* v. *Gilfoil*, 99 U. S. 168; *Latham* v. *Chafee*, 7 Fed. Rep. 520. If this were not so it has always been held that, in order to have the mere pendency of one suit defeat another, the suits must be between the same parties, or their representatives, upon the same facts, and for the same relief. *Watson* v. *Jones*, 13 Wall. 679. A very slight examination and comparison of the two cases will show that they are not brought upon the same facts nor for the same relief. The plea is pleaded to the whole bill. According to both bills the Central Vermont Railroad Company is in possession of the road. In that case it is an orator as a security-holder seeking to hold the road as security for its pay. This particular defendant is a defendant there admitting the right of the Central Vermont Railroad Company. That is essentially a bill of foreclosure by security-holders in possession. The decree would ordinarily be that those interested must pay or be foreclosed of all right to redeem. The decree could go no further than to cut off their right if they should not redeem. If they should redeem, the possession would remain to be maintained by any other right which the possessor might have or claim to have, so far as it would prevail. Another suit would be necessary to determine the rights of the Vermont & Canada Railroad Company and its stockholders as to everything but the foreclosure. In this suit the right to the road is attempted to be maintained outside of the right to redeem. If this plea should prevail there would be no suit left in which that right could be tried.

The plea of the Central Vermont Railroad Company raises the most important questions of any of these pleas, and has received such careful consideration as its importance has seemed to demand. The bill alleges that this defendant is in possession of the road without right, and against the right of the Vermont & Canada Railroad Company and of the orators. This plea asserts that it was placed in possession by the court of chancery of Franklin county to run, operate, and manage the road under the decree and orders theretofore made, and under the direction of the court, so long as

it should continue to act as such receiver and manager, and denies that it is in possession without right, and that it ought to be compelled to surrender its possession to the Vermont & Canada Railroad Company, and prays judgment whether it ought to answer further. The proceedings upon which it was placed in possession show that certain persons were, in regular course, made receivers of this road, with other railroad property, to operate the roads, and out of the income to pay the rent to the Vermont & Canada Railroad Company; that pursuant to an agreement between the parties, according to its terms embodied in a decree, the then receivers continued to operate the roads according to the provisions of the agreement and decree, by which they were to operate them and apply the income to the payment of the rent; then to the payment of the first-mortgage bonds of the Vermont Central Railroad; then to the second-mortgage bonds of the Vermont Central Railroad; and then to pay it to the Vermont Central Railroad Company; and that upon the joint petition of those receivers and their successors, and the Central Vermont Railroad Company, a decree was made by which the Central Vermont Railroad Company was placed in possession in their stead.

The orators claim that the prior possessors had lost their right to this road through their non-payment of rent, and that the transfer to the Central Vermont Railroad Company was merely a transfer by one to the other, although sanctioned by the court, and that the transferee took no greater or different rights than the transferors had. The defendants claim that the transfer was ordered by the court; that the rights of the Central Vermont Railroad Company, under the transfer, cannot be inquired into anywhere except in that court; and that they are valid everywhere else against all claimants. The right of the orators, denied by the plea, is the same which they set up and seek to enforce by their bill, and which they claim to have tried and determined upon the answer of the defendants in the usual course. As stated before, the parties are citizens of different states, and this is a suit in which there is a controversy between them, and which those bringing it have the right to have determined in this court, unless there is some unusual reason for turning them out of court.

As said by Mr. Justice Campbell in *Hyde* v. *Stone,* 20 How. 170: "But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to

which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." This is not a mere matter of abatement; it goes to the right, and none the less because the right of the defendant may rest upon an order of the court. The order of court, whatever its effect is, may be discharged before any decision is reached, and, if it should be, the rights of the parties otherwise would still remain to be determined. If it should not be, but should remain in force, whatever right it should give to any party, or whatever immunity from interference it should afford, could be maintained and upheld. If that should be the defendant's title, and it should be found to be good, it would prevail. There would be no conflict between courts, for all rights acquired through the state court, and all protection furnished by the authority of that court, would be respected. There is no sound reason apparent why these rights may not stand for trial according to the usual course, the same as rights acquired by contract, or in any other mode. On principle this seems to be the proper course. And there is not any case shown by counsel, or which has been seen by the court, among the many wherein rights acquired under legal proceedings have come up for adjudication, in which the decision has been made otherwise than in chief.

In *Hagan* v. *Lucas,* 10 Pet. 400, where the title of a sheriff to property seized by him and receipted was upheld against a marshal of the United States, who seized it subsequently, the trial was upon the merits of these respective rights. So in *Brown* v. *Clarke,* 4 How. 4, and in *Pulliam* v. *Osborne,* 17 How. 471. And in *Taylor* v. *Carryl,* 20 How. 583, where the question was as to the right of a state seizure, as against proceedings in admiralty, the trial was not upon any plea denying the right to interfere, but was upon the title acquired through the proceedings.

In *Freeman* v. *Howe,* 24 How. 450, the right of a mortgagee to personal property taken by the marshal, on process against the mortgagor, was tried on replevin in chief. So similar rights were tried in an action of trespass in *Buck* v. *Colbath,* 3 Wall. 334. And in *Wiswell* v. *Sampson,* 14 How. 52, the right acquired by the levy of a marshal upon property in possession of a receiver was tried upon ejectment on the merits.

In *Pond* v. *Vermont Valley R. Co.,* 12 Blatchf. 292, the question of this same receivership was raised, but not until after the decision reported, and upon the hearing before Circuit Judge Johnson on

answers and proofs, and it was disposed of as not affecting the rights of the parties to the property involved, nor the jurisdiction of the court over the case.

Attention has been particularly called to the provisions of section 5 of the act of March 3, 1875, to determine the jurisdiction of the circuit courts, etc.; 18 St. at Large, 470 (Supt. Rev. St. 175), enacting:

"That if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just," etc.

Speaking of this section, Johnson, J., in *Warner* v. *Pennsylvania R. Co.*, 13 Blatchf. 231, said: "All that is necessary to bring the case really and substantially within the jurisdiction is, that it involves a controversy of the character, either as to the subject-matter or the parties, specified in either the section which defines the jurisdiction by original suit, or that which authorizes removal, and the acquisition of jurisdiction in that manner." As before stated and shown, the parties to this suit are citizens of different states, and the suit is one of which this court has jurisdiction for that reason, if the orators can make out the case presented by their bill, including the refusal of the directors to prosecute as a part of their case; if they cannot they have no case. That part of their case, as also before shown, has not been denied in the necessary manner by answer to be effective to defeat the case upon that point, and there is no evidence before the court, upon that or any other point, to make it appear at all that parties have been either improperly or collusively made or joined for the purpose of creating a case within the jurisdiction. There is nothing before the court now on which the court is authorized to act under the provisions of that section.

The pleas and demurrer are overruled; the defendants to answer over by the first day of next term.

ANSWER.

Holt v. *Daniels, 61 Vt. 89. (1888.)*

This was a suit in chancery. The bill alleges that some time previously the orator had bought of the defendant a colt, for which he had given the defendant his note with the condition that the colt should be the property of the defendant until the note was fully paid; that since the giving of said note there had been other deal between them, and that there was due the orator a large balance from the defendant, more than sufficient to discharge the balance of the note, and that if upon an accounting between them anything should be found due from the orator, he was ready and willing to pay such balance to the defendant; that the defendant for the purpose of embarrassing the orator had begun a suit in trover against him for the conversion of the said colt, and that such suit was then pending; that since the giving of said note the orator had taken the farm of the defendant to carry on upon shares, under a written memorandum, and that the defendant was largely liable to the orator under such written memorandum, but that the same was in the possession of the defendant, who refused to exhibit to the orator, or to settle with him, and allow him the amount his due; that in the making of the said farm trade he had been largely damnified by the false representations of the defendant; that he had taken possession of the defendant's farm, and carried on the same, and that the defendant utterly refused to account to him in the premises; praying that an account be taken between the parties, and that if upon such an accounting there is any balance due the defendant upon said note, the orator may be allowed to pay the same and redeem the colt, and that the suit at law be perpetually enjoined.

The answer admitted the making of the farm trade, and set out the contract *in extenso;* denied that there was any balance due the orator on it, or that the note secured by lien on the colt had been paid; insisted that the orator had a complete remedy at law, and that therefore the court had no jurisdiction.

The case was referred to a master who reported with reference

to the circumstances under which the farm was leased and colt sold as follows:

"A few days before the lease was executed but when the contract was in contemplation, the defendant sold to the orator a four-year-old horse colt at an agreed price of $116 and took from him his promissory note therefor and reserved a conditional lien on said colt for the security of the payment of said note by the orator.

I find that it was the express understanding and agreement between the parties at the time this conditional sale was made and the note given by the orator, they then having in view the farm trade for the ensuing year, that the orator's share of the money that should be derived from the sale of butter produced on the farm, when it should be sold in the fall of the ensuing year, should be applied first to the payment of this note, and that the orator and defendant both so understood it."

When the butter was so sold, there was more than enough of the orator's share to extinguish the note, and the orator desired that it should be so applied, but the defendant refused to so apply it, and claimed to retain it as security for the fulfilment of the terms of the lease on the part of the orator."

With reference to items 42 and 43 the master reported:

"If in the opinion of the court the orator can recover damages in this suit for the false representations made by the defendant to the orator as to the productiveness of said farm, then I find that the difference between what the farm was represented to be and what it really was, amounts to the sum allowed on these two items, $118, and that they should be disallowed to the defendant; but if in the opinion of the court such damages cannot be recovered by the orator in this suit, then said items should be allowed as designated above."

There had been other deal between the parties, and as a result of the entire accounting the master found that, allowing items 42 and 43, there would be due the defendant the sum of $75.02, March 1, 1884; that disallowing said items, there would be due the orator on said date the sum of $42.98.

The defendant had demanded the colt of the orator, and on his refusal to surrender the same, had begun a suit against the orator in trover for its conversion, which was then pending.

The master further reported that the defendant insisted at the

earliest possible moment before him, that this suit could not be maintained for the reason that the orator had a complete remedy at law.

To this report the defendant filed exceptions, and the case was heard at the March Term, 1888, Washington County, Rowell, Chancellor, upon the pleadings, report and exceptions thereto, whereupon it was ordered that the bill be dismissed. Appeal by the orator.

Powers, J.:

The defendant, by a demurrer interposed into his answer, raises the question of the jurisdiction of the Court to entertain the bill. The propriety of this mode of pleading has been considered of late, and the effort has been to adhere to the rules of pleading laid down in the text books and best considered cases.

The respective functions of a demurrer and an answer are entirely distinct and one cannot take the place of the other. The answer serves the double purpose of pleading and evidence. So far as it sets up matter as a bar it is a pleading. So far as it serves the complainant's purpose by discovering facts, it is a deposition. If the defendant would waive making an answer, he may demur or plead. The object of a demurrer or plea, as a general rule, is to excuse the defendant from answering the bill on its merits. Both are dilatory pleadings, a demurrer being proper if the fault of the complainant's case is apparent from the face of the bill, and a plea being proper if the fault must be shown by bringing matter *dehors* upon the record. Accordingly it has been generally said in the books that a party cannot demur or plead and answer the same matter, but he may demur to one part of the bill, plead to another and answer to another. If he answers to the same part that he demurs to, his answer will overrule his demurrer. The rule is the same at law. 1 Chit. Pl. 512. The reason for the rule is thus given by Gilbert, Forum Rom. 58, in speaking of dilatory defenses, "all these pleas with us are to be put *ante litem contestam,* because they are pleas only why you should not answer, and therefore if you answer to anything to which you may plead, you overrule your plea, for your plea is only why you should not contest and answer, so that if you answer, your plea is waived." This rule is laid down everywhere as expressive of the true function of a demurrer or plea in its relation to the answer.

Mitford (Tyler's Ed.) 304, 305, 411, Beames' Pl. in Eq. 37; *Whaley* v. *Dawson,* 2 Sch. & Lef. 371; *Jones* v. *Earl of Strafford,* 3 P. Wms. 81; *Oliver* v. *Piate,* 3 How. 412; *Clark* v. *Phelps,* 6 Johns. Chan. 214; *Wade* v. *Pulsifer,* 54 Vt. 71.

Incorporating a demurrer into an answer is often done and no violation of the rule is occasioned if the demurrer is left for consideration as if it stood alone. In the old precedents instances may be found of demurrers and pleas incorporated into answers, but in each case the answer was provisional, the plea ending with a demand for judgment, and then proceeding, "and if this defendant shall by order of this honorable court be compelled to make any other answer to the said bill, etc., then and not otherwise the defendant saving, etc., answereth and saith," going through the answer as if no plea had been put in. The more modern practice, however, and the one sanctioned by Mitford and other standard writers, is to file each pleading by itself. But in all cases the demurrer should be brought to a hearing before the cause is tried on its merits. *Wade* v. *Pulsifer,* 54 Vt. and cases there cited.

In this case it is urged that a court of equity has no jurisdiction, as a court of law could give the orator an adequate remedy. This objection, if valid, is apparent upon the face of the bill and so is the subject of a demurrer, and if it be sustained the case is at an end. But an objection to the jurisdiction of the court, if the court has general jurisdiction of the subject matter, will not be entertained unless it is brought to a hearing before the expense of a trial upon the merits has been incurred. In 1 Dan. Chan. Prac. 579, it is said that if the objection to the jurisdiction is not taken seasonably by plea or demurrer and the defendant enters into his defense at large, the court having the general jurisdiction will exercise it. To the same effect are the cases *Cong. Society* v. *Trustees, etc.,* 23 Pick. 148; *Underhill* v. *Van Cortlandt,* 2 Johns. Chan. 369; *Bank of Bellows Falls* v. *R. & B. R. R. Co.,* 28 Vt. 470. Indeed the rule in equity appears to be the same as at law. A plea to the jurisdiction at law is said to be analagous to a plea in abatement and is the earliest in the order of pleading, and if the general issue be pleaded the jurisdiction is confessed. So in equity it is a dilatory objection that is waived by an answer. In equity, as at law, if the court discovers that under no circumstances has it jurisdiction in the

premises, it will, at any stage of the proceedings, dismiss the cause *sua sponte,* if no objection is raised.

In the case at bar a court of equity has jurisdiction. The sale of the colt to the orator with a lien reserved to the defendant amounted to a mortgage of the colt. The orator all the time had an equity of redemption and after condition broken might sustain a bill to redeem as was held by this court in *Blodgett* v. *Blodgett,* M. 48 Vt. The facts appearing from the master's report show that the question whether the defendant's lien upon the colt had been extinguished by payment in full depended upon an accounting of the farm dealings. Courts of equity have concurrent jurisdiction with courts of law in all cases where the common law action of account would lie, Fonblanque Eq. 1, 10; Cooper Tr. 26; Bispham Eq. 484; *Ludlow* v. *Stenard,* 2 Caine's Cas. in Error 1; *Leach* v. *Beattie,* 33 Vt. 195, and in many other cases where the accounts are intricate and a discovery is demanded. In the action of trover brought by the defendant against the orator, no offset arising out of the farm dealings would be available to the orator, and unless he could make out full payment of the lien, he would be cast in the suit. But in equity on an accounting he can have applied all the indebtedness in his favor that he can establish, and if this is insufficient to extinguish the lien, the court can give him a day of redemption.

In taking the accounts of the parties, the master finds that items 42 and 43 in the defendant's specification accrued from false representations of the defendant. These items should be disallowed, as in equity no one can be made a debtor by fraud.

The decree is reversed and the cause remanded with a mandate to enter a decree for the orator to recover the sum of $42.98 reported by the master, with interest thereon from March 1, 1884, and that the further prosecution of the suit at law in favor of the defendant against the orator mentioned in the pleadings be perpetually enjoined.

Moors v. *Moors, 17 N. H. 481. (1845.)*

In Equity. The statements of the bill and answer, together with important testimony in the case, are set forth by the court in the opinion.

Woods, J.:

The plaintiff, in this suit, seeks to be relieved against a suit commenced at law by the defendant upon a promissory note of $1,025.52, signed by her, and delivered to him on the 18th day of October, 1840. The grounds upon which she claims the interposition of this court are, without any doubt, sufficient to entitle her to the relief sought, if the evidence is sufficient.

She states, in substance, that she had a settlement with the defendant on that day, relating to an item of rent, which he owed her, and an item of money, paid by him for taxes which she owed him, and a claim which was at first disputed, but afterward admitted by her, of $25, which he called on her to pay him for wood he had furnished her father; that the balance due to him upon the adjustment of these items was about $10, for which she was willing to give her note, and for which she intended to give her note; but that, trusting her brother to write it, she, through his fraud, had been made to sign a note for $1,025.52, the subject of the controversy.

She states that she did not, at the time, owe him any further or other sum, and interrogates him as to whether there were any other demands or claims considered or included in the settlement, and if so, what? Whether there were any claims presented for money borrowed, and if so, what?

The answer of the defendant was quite full, and shows that he held two notes against the plaintiff at the time of the settlement, from the aggregate amount of which the small balance of accounts due her was deducted, and the note in question for the remainder, and that the old notes were given up to her to be canceled.

This allegation in the answer does not derive direct support from evidence; but, on the other hand, the plaintiff has produced one witness, who was present during the interview, and who appears to have had some knowledge of the business that was in

progress, and who did not hear any mention made of the old notes, or of money borrowed by the plaintiff of the defendant on former occasions. This was Friend Moors.

His wife was also present a part of the time, and, although she heard conversation about rent and taxes, and wood, did not learn that the settlement comprehended the more important matters of the notes.

The testimony of these witnesses tends undoubtedly to sustain the allegations in the bill; that the three items of mutual account, which are described in it, were all that were comprehended in the settlement, and that the small balance resulting formed the only consideration for the note.

But that testimony has to be considered in connection with the defendant's answer, which, in this material point in the controversy, is in direct conflict with the allegations of the bill, and the question arises as to the weight that is to be allowed to the answer.

The general rule of law is quite clear, that when the answer controverts a material allegation of the bill, no decree can be made for the plaintiff, unless the answer in that particular is overborne by evidence that is more than equivalent to the testimony of one witness. 2 Story's Eq., sec. 1528; *Dodge* v. *Griswold,* 12 N. H. Rep. 577.

In order that the answer may have that force, it is necessary that the statement of the bill which it controverts be a material statement; that is, that it be essentially a part of the plaintiff's case, and that the answer, so far as it relates to the statement, contain such matters only as the defendant is required by the exigencies of correct pleading to embrace in his answer. Or, in other words, that it go to the point of discovery, to which the plaintiff is entitled, by the case that he has stated; for it is clear that a statement which the defendant volunteers is entitled to no such consideration as is accorded to an answer strictly responsive to, and clearly demanded by, the case of the plaintiff.

The plaintiff's case, as stated by the bill, is, that the note in controversy was obtained by fraud; that she did not intend to give such a note; that no such sum was due, and that no other demands than those which she enumerated were embraced in the settlement.

Now it is sometimes a question of difficulty to settle how far

a defendant is required to go in his answer, and how far he may protect himself by saying that it is as particular as the plaintiff's question. Story's Eq. Pl., sec. 855, note. But one principle, well stated, and stated in the books in the various forms, is this: that a simple denial of the plaintiff's case literally, as stated, is wholly insufficient. He must meet it with full and circumstantial denial, and not with a negative pregnant, which, while it controverts the case in the precise terms in which it is stated, is perfectly consistent with one not substantially differing from it. Story's Eq. Pl., sec. 855; *Woods* v. *Morrill,* 1 Johns. Ch. 103. As, if he be charged with the receipt of a sum of money, he must deny that he has received that sum, or any part thereof, or else set forth what part he has received.

If to that part of the bill which stated what items were comprehended in the settlement, the defendant had said no more than that other items were comprehended, the plaintiff might still have had substantially the case made by the bill, and the answer yet have been true.

To that part of the bill which states that no more than the small sum named was due, the defendant was bound to answer, not only how much was due, but, to the best of his ability, upon what account it was due. Such discovery is important to enable the plaintiff to amend her case, or to maintain it by disproving the consideration, which, of course, it is the more difficult to do before the defendant has been called on to specify it. These obvious purposes of the discovery would have been defeated by a less explicit answer.

The answer, therefore, in discovering what matters were embraced in the settlement, contained no more than the defendant was bound by the statement of the plaintiff's case to set forth, or was, in other phrase, strictly responsive to the bill.

Although tending to sustain a material statement of the bill, we cannot say that the testimony of Friend Moors and his wife is in conflict with the answer in the particulars to which they in common relate. Had those witnesses participated in the transaction; had they, or either of them, had occasion or an interest to know its details, or had they even been so situated that they could have known them with reasonable certainty, the case would have been different. As it was, it is not unreasonable to suppose that they might have heard more of the smaller items, that required

and actually engaged discussion, than of the greater matters of the notes and interest, which might have been adjusted with fewer words, because of a nature to admit of no question.

It is plain that all that is stated in the answer, on the subject of the settlement, might have been strictly true, and yet the facts stated have wholly escaped the notice of both the witnesses. However their testimony, therefore, may tend to detract from the credit that might otherwise be due to the answer, it ought not to be considered as coming in direct conflict with it. The answer is the testimony of one directly to a fact, about which it is scarcely possible that he could have been mistaken, or that he could have forgotten. The testimony of the witnesses, on the other hand, is only to the point that they did not observe a transaction that it is certainly possible might have taken place without their observation.

Nor can we say that the case of the plaintiff derives material support from considering the other evidence which has been adduced by either party. No part of it goes to the point of sustaining the allegations of the bill against this denial in the answer, of the very essence of the plaintiff's case, even if we could say that the preponderance was in favor of the plaintiff, on the secondary matters on which it bears.

The conclusion is, that the plaintiff's case, having been denied by the answer, and not sustained by sufficient evidence, no decree can be pronounced in her favor.

Bill dismissed without prejudice.

Beech v. *Haynes, 1 Tenn. Ch. 569. (1874.)*

THE CHANCELLOR:

The question submitted to me on this record is one that savors, perhaps, more of curiosity than of practical utility in the present state of the law of evidence. It is, how far the complainant may use the admissions of a defendant in his answer to charge him, without giving him the benefit of the matters of discharge or avoidance, with which the admissions are coupled. And the difficulty is not so much in ascertaining the law bearing upon the point in question as upon the application of that law to the facts of the particular case.

The general rule undoubtedly is that an answer which, while admitting or denying the facts in the bill, sets up other facts in defense or avoidance, is not evidence of the facts so stated. Sto. Eq. Jur. § 1,529; Gresley's Eq. Ev. 13. This rule, upon a careful review of the authorities, was considered as well settled by Ch. Kent in *Hart* v. *Ten Eyck,* 2 J. Ch. 88; and, although its application to the facts of that case was held erroneous by the court of errors, it has been approved by the Supreme Court of the United States in *Clements* v. *Moore,* 6 Wall. 315, and by our Supreme Court in *Napier* v. *Elam,* 6 Yer. 113. The qualification of the rule, or of its application, established by the Court of Errors of New York upon appeal in the case of *Hart* v. *Ten Eyck,* is stated to have been, for the decision was never reported, that if the facts in discharge or avoidance are a direct and proper reply to an express charge or interrogatory of the bill, then the answer is evidence of those facts. *Woodcock* v. *Bennett,* 1 Cow. 744, note. And this distinction has also been adopted by our Supreme Court. *Alexander* v. *Williams,* 10 Yer. 109; *Goss* v. *Simpson,* 4 Cold. 288; *Walter* v. *McNabb,* 1 Heisk. 703. And this whether the response be by a direct denial or by a statement of facts by way of avoidance. *Hopkins* v. *Spurlock,* 2 Heisk. 152. Some authorities are quoted as holding that where a defendant, in response to the bill, once admits liability, there is no escape except by proof of the matters of discharge or avoidance. *Dyre* v. *Sturgess,* 3 Des. 553; *Paynes* v. *Coles,* 1 Munf. 395; *Fisler* v. *Porch,* 2 Stock. 248. It is probable, however, that a careful analysis of the cases would show that the rule is substantially the same everywhere, but its application is varied by the particular facts of the several cases.

A qualification of the general rule is, that where the transaction is a continuous one, and the matters of charge and discharge occur at the same time, the whole statement must be taken together. *Robinson* v. *Scotney,* 19 Ves. 582; *Lady Ormond* v. *Hutchinson,* 13 Ves. 50; *Thompson* v. *Lambe,* 7 Ves. 588. The qualification is more broadly stated under the English practice in 2 Dan. Ch. Pr. 835, thus: "Where a plaintiff chooses to read a passage from the defendant's answer, he reads all the circumstances stated in the passage. If the passage so read contains a reference to any other passage, that other passage must be read also." *Bartlett* v. *Gillard,* 3 Russ. 157; *Nurse* v. *Bunn,* 5 Sim. 225. The old de-

cisions went so far as to hold that a discharge in the same sentence with the charge would be evidence (because the whole context must be read), when it would not have been if stated separately. *Ridgeway* v. *Darwin,* 7 Ves. 404; *Thompson* v. *Lambe,* 7 Ves. 588. The consequence of which was, as stated by Mr. Gresley in his work on Evidence in Equity, p. 15, that formerly much of the skill required in drawing an answer consisted in uniting by connecting particles important points of the defendant's case with admissions that could not be withheld. The answer in the case now before me seems framed on these old cases. But the modern decisions are governed by the sounder rule of being controlled by the sense instead of the contiguity or grammatical structure of the sentences. Passages connected in meaning may be read together from distinct parts of the answer. *Rude* v. *Whitechurch,* 3 Sim. 562. And, on the other hand, if the matter in avoidance has been skilfully interwoven into the sentences containing responsive admissions, the complainant will be entitled to have the matter of avoidance considered as struck out. *McCoy* v. *Rhodes,* 11 How. U. S. 131; *Baker* v. *Williamson,* 4 Penn St. 467; 3 Greenlf. Ev. § 281.

The rule, it will be noted, which considers an admission as binding, and as throwing upon the defendant the burden of proving the matter of avoidance, applies only to admissions which are responsive to or go to support the charges of the bill. The reason is, that otherwise the matter of admission would not be in issue, and if the complainant reads it, he reads it as evidence, not as pleading, and must read the whole; and no relief can ordinarily be granted upon it except by conceding the facts to be as stated in connection with the admission. *Neal* v. *Robinson,* 8 Hum. 438; *Mulloy* v. *Young,* 10 Hum. 298; *Jameson* v. *Shelby,* 2 Hum. 201; *Rose* v. *Mynatt,* 7 Yer. 30.

The matter in avoidance or discharge, if in response to a direct charge, is, as we have seen, evidence in favor of the defendant. *Smith* v. *Clark,* 4 Paige, 373. But it seems that a statement of the answer expressly waived or not called for, is not responsive, and not evidence. *Jones* v. *Best,* 2 Gill. 106. This limitation may be important in the present case, for the bill expressly calls upon the defendant to declare "when, where and from whom he purchased cotton for the complainants, and when, where and to

whom he sold it," and adds: "The discovery which complainants seek is confined exclusively to these points."

The bill is filed for the purpose of charging the defendant with cotton bought by him with certain moneys of the complainants acting as their agent, and with the proceeds of the sales of such cotton. The answer admits the receipt of the money, the purchase of cotton, and the sale thereof as complainant's agent, and discloses "when, where and from whom the defendant purchased cotton for the complainants, and when, where and to whom he sold it." The answer states the amount of cotton bought, but adds that at least one-fourth was lost by stealage or otherwise. It also states the prices at which the cotton was sold, and adds "that out of the proceeds of sale, the expenses of keeping, carrying to market, and selling the cotton, and a large government tax, contained in an itemized schedule (annexed to the answers) were paid." The answer is replied to under our practice, and there is no proof.

The answer admits the contract as alleged in the bill, and the purchase and sale of cotton as agent, but states, in avoidance, that the cotton was to be bought in the Confederate lines, the contract having been made in the Federal lines. The matter in avoidance is clearly not evidence under any of the recognized rules and must be proved.

In this state of the case and the pleadings, if there were nothing more, it is clear that the complainant would be entitled to a decree reciting the contract, and the fact that the defendant had bought and sold cotton under it, and to a reference to the master to take and state an account between the parties, in which he should charge the defendant with all cotton which was purchased with the defendant's money, and with the proceeds of such of the cotton as may have been sold by him, allowing him all just credits in the way of loss of cotton without fault on his part, and all proper disbursements in the care, preservation and disposition of the cotton. The complainants are not compelled, either at the hearing or upon the reference to read any part of the answer as evidence of the amount of cotton bought or sold, and the defendant himself could only read such parts of the answer as are responsive to the charges and interrogatories of the bill, under the rules as hereinbefore set forth. But the complainants claim now, upon the hearing, to use against the defendants his admissions of charge without giving him the benefit of the matters of discharge. And the question

for consideration is, can this be done under the pleadings in this case?

The general rule, as we have seen, is that the complainant may read any portion of the defendant's answer which goes to support the case made in the bill. *Bartlett* v. *Gale,* 4 Paige, 507. The admissions which the complainants in this case propose to read do clearly support the case made in the bill. The defendant was not bound to make them, the discovery having been expressly waived; but having made them, the complainant may, if he chooses, rely upon them as fixing the defendant's liability. It is clear, also, that the discovery called for having been limited so as not to include the details, the defendant could not himself read any portion of the matters of discovery, either of charge or discharge, unless they are responsive to a direct charge or interrogatory of the bill. There is no interrogatory calling for such discovery, the interrogatories having been purposely limited. If, however, this part of the answer were directly and properly responsive to a positive charge of the bill, I think the defendant would have been entitled to read it, notwithstanding the limitation quoted from the bill. For that limitation, it is obvious, was not intended to prevent the defendant from answering the charging part of the bill, but merely to restrain the discovery, so far as it could be evidence for the defendant, to those charges. *Smith* v. *Clark,* 4 Paige, 373. Is there, then, any charge in the bill which calls for the details of the answer in discharge?

The bill does charge that the money received by defendant (which sum is admitted by the answer), invested at twenty-five cents per pound, the price paid as averred, would have purchased 15,319 pounds, and adds: "Complainants are satisfied that he (defendant) realized from the cotton nearly or quite fifty cents per pound net, and at least $7,500." If, now, the discovery had not been expressly limited, the answer stating the real amount of cotton bought and the net proceeds realized, would perhaps have been responsive under the qualification of the general rule, as "a statement of facts by way of avoidance." Be this as it may, the express limitation of the discovery rendered anything more than a denial of the charges of the bill not responsive within the rule which permits the defendant to use responsive matter of avoidance as evidence in his favor. The complainant has the right so to limit his charges, and his calls for discovery as to confine the responsive

part of the answer within a narrow compass, and this has been done in the present instance.

The conclusion is that the complainants may insist upon the matters of charge in the defendant's answer without giving him the benefit of the matters of discharge.

In the examination of the question discussed above, I think I have discovered the source of the strange dictum of our Supreme Court in *Ragsdale* v. *Buford,* 1 Hay. 194, that "in no case is an answer replied to evidence against the plaintiff," a dictum commented on by me in a note to that case in my edition of Haywood's Reports. An answer, as we all know, performs a double office, and is both a pleading and a discovery. Sto. Eq. Pl. § 850. This distinction was noted by Sir Samuel Romilly, then Solicitor-General, in his argument in the case of *Lady Ormond* v. *Hutchinson,* 13 Ves. 50. The complainant having relied upon an admission in the answer, the defendant seems to have insisted that the whole answer should be read. No, said the Solicitor-General; for, although the rules of evidence are the same in equity as at law, and, if you undertake to read an answer at law you must read the whole of it, yet, he adds: "When passages are read from an answer [at the hearing in Chancery] which is replied to, it is not produced as evidence, but to show what he has admitted, as to which, therefore, it is unnecessary to produce evidence; as to the rest, the plaintiff, having replied to the answer, puts him on proof. Upon a bill for discovery only, the answer being produced as evidence, the whole of it must be read, not a part only." This distinction was approved by the Lord Ch. (Erskine) in his opinion in that case. Chancellor Kent in commenting on this language in *Hart* v. *Ten Eyck,* 2 J. Ch. 91, says: "It was said that when passages are read from an answer which is replied to, and is not an answer to a mere bill of discovery, they are not read as evidence, in the technical sense, but to show what the defendant has admitted and which, therefore, need not be proved." It is impossible to place the language of the Chancellor and Solicitor-General in juxtaposition with that of our Supreme Court above referred to, without seeing that the only object of the latter was to call attention to this distinction. For, they add, following the lead of Sir Samuel Romilly, "the answer which cannot be replied to is evidence for the defendant. That is the case of an answer to a bill for discovery." The language is not

as accurate as that of Ch. Kent, but was meant to convey the same idea, namely, that an answer on a hearing in equity is not evidence, in a technical sense. And, it is obvious, that the court had no intention to lay down general principles in conflict with their own positive rulings, and that the compilers of our Digests have erred in carrying the words into their Digest as absolute rulings.

In like manner, what the court say in the same case about the bill is strictly accurate when the intention with which it is made is kept in view. "Neither, they say, is more verity attributable to a bill sworn to than to one which is not so. The oath of the plaintiff is required *ad informandum conscientiam curiæ,* not for the purpose of making it evidence against his adversary who denies it." Neither the bill nor the answer is evidence, in a technical sense, on the hearing of a cause in chancery, nor is either allowed to be read *in extenso* under the English practice. The plaintiff only reads such part of the answer as he relies on to support his case as admissions, and the defendant reads such part of the bill he relies on as admissions. We read the pleadings, *ad informandum conscientiam curiæ,* in lieu of the preliminary statement of counsel required in England. 2 Dan. Ch. Pr. 996.

Exceptions to Answer.

Brooks v. *Byam, 1 Story, 296. (1840.)*

Bill in equity. The bill in this case states, that one Alonzo D. Phillips obtained letters patent for the making of friction matches; that he sold six rights therein, that is, the right to employ six persons at the same time, in the manufacture of the said matches, to one John Brown; and that Brown sold one such right to the plaintiff; but that the deeds of conveyance, both to Brown and the plaintiff, were not recorded in the Patent Office, as the law requires. It also states, that the defendants, claiming to be the sole assignees of Phillips, by a deed of conveyance from him to Byam, and from Byam to the other defendants, but of later date than the deed to the plaintiff, had commenced a suit against him, in the Circuit Court of the United States, for Massachusetts District, for an alleged invasion of their said right; the plaintiff averring, that he

has done nothing therein not granted to him by the deeds from Phillips to Brown, and from Brown to him.

It then proceeds to state, that at the time of the assignment from Phillips to Byam, and before delivery of the deed, "the said Byam was informed, and well knew, or had good cause to believe, that the said Phillips had previously conveyed to the said John Brown the right before mentioned, as set forth to have been so assigned and conveyed; and that the said Brown had previously conveyed to the plaintiff the right herein before set forth, and alleged to have been so assigned and conveyed; and that the said Byam had previously caused inquiry to be made, whether the said several instruments of conveyance and assignment to the said Brown and Brooks had been recorded." It then proceeds to allege the same knowledge or belief, in like terms, by the other defendants, at the time of the conveyance of their rights from Byam.

Prentiss Whitney, one of the defendants, whose answer is excepted to, says, that he "does not of his own knowledge know," whether Byam had any information, knowledge, or "any cause to believe" the facts above stated; but that he "has been informed by said Byam, that at the time when" (&c.), "the said Byam had no knowledge, information, or cause to believe, that said Phillips had made any conveyance to said Brown" (&c.), "and this defendant has no knowledge, information, or belief, that the information so derived from said Byam is not true." He then proceeds to say, that "he has been informed by said Byam, and verily believes, that he did not make any inquiry," whether Brown's and the plaintiff's were recorded, as stated in the bill.

The plaintiff filed the following exception to the answer:

"The plaintiff excepts to the answer of Prentiss Whitney, one of the defendants in this case, because, in stating in the said answer, what he has been informed of by the said Byam, he does not say, whether he actually believes the same to be true. And he prays, that the said Whitney may be required to put in a better answer in that particular. By his Solicitor, S. Greenleaf."

STORY, J.:

The question arising, in this case, is upon the exception taken by the plaintiff in equity, to the answer of Prentiss Whitney, one of the defendants, "because, in stating in his answer, what he has been informed of by Byam (another defendant), he does not say,

whether he actually believes the same to be true." Certainly, this exception is taken in a form and manner entirely too general, to be upheld by the Court. The exception should have stated the charges in the bill, and the interrogatory applicable thereto, to which the answer is addressed, and then have stated the terms of the answer verbatim, so that the Court, without searching the bill and answer throughout, might at once have perceived the ground of the exception, and ascertained its sufficiency. It is very properly observed by the Vice Chancellor (Sir John Leach) in *Hodgson* v. *Butterfield,* 2 Sim. & Stu. 236, that "if the plaintiff complains, that a particular interrogatory of the bill is not answered, he must state the interrogatory in the very terms of it, and cannot impose upon the Court the trouble of first determining, whether the varied expressions of the interrogatory and the exception are to be reconciled."[1] To which it may be added, that the same rule applies in respect to the necessity of stating the charge or fact in the bill, on which the interrogatory is founded; for, if the interrogatory be irrelevant to the matters charged in the bill, the defendant need not answer the interrogatory at all.[2] The Court ought, therefore, without searching through the whole bill, from the form of the exception, to have the materials fully before it, by which to ascertain at once its competency and propriety. In this respect the exception is in itself insufficient and exceptionable. The objection, however, has not been insisted upon at the bar.

Nothing is more clear in principle, than the rule, that in the case of an interrogatory, pertinent to a charge in the bill, requiring the defendant to answer it "as to his knowledge, remembrance, information and belief" (which is the usual formulary), it is not sufficient for the defendant to answer as to his knowledge; but he must answer also, as to his information and belief. The plain reason is, that the admission may be of use to the plaintiff as proof, if the defendant should answer as to his belief in the affirmative, without qualification. Thus, although a defendant should state, that he has no knowledge of the fact charged, if he should also state, that he has been informed and believes it to be true, or simply, that he believes it to be true, without adding any qualifica-

[1] See also Gresley on Evid. 21.

[2] Mitford Eq. Pl. by Jeremy, 45; Cooper Eq. Pl. 12; Gilb. For. Roman. 91. 218; Story on Equity Plead. § 36; Gresley on Evid. 17 to 20, Am. edit. 1837; Story on Equity Plead. § 853; Harrison Ch. Pract. by Newland, ch. 31, p. 181.

tion thereto, such as that he does not know of it of his own knowledge to be so, and therefore, he does not admit the same, it would be taken by the Court, as a fact admitted or proved; for the rule in equity generally (although not universally) is, that what the defendant believes, the Court will believe.[1] The rule might, perhaps, be more exactly stated, as to its real foundation, by saying, that whatever allegation of fact the defendant does not choose directly to deny, but states his belief thereof, amounts to an admission on his part of its truth, or, that he does not mean to put it in issue, as a matter of controversy in the cause. But a mere statement by the defendant in his answer, that he has no knowledge, that the fact is, as stated, without any answer, as to his belief concerning it, will not be such an admission, as can be received as evidence of the fact.[2] Such an answer is insufficient; and, therefore, the defect properly constitutes a matter of exception thereto, since it deprives the plaintiff of the benefit of an admission to which he is justly entitled.[3] However; Courts of Equity do not, in this respect, act with rigid and technical exactness, as to the manner, in which the defendant states his belief, or disbelief, if it can be fairly gathered from the whole of that part of the answer, what is, according to the intention of the defendant, the fair result of its allegations.[4]

It is obvious, that in answers as to the information and belief of the defendant, there may be, and indeed, ordinarily will be, partial admissions and partial denials, of every shade and character, some of which may be delivered in terms of great ambiguity and uncertainty, and some mixed up with various qualifications, and attendant circumstances.[5] No general rule, therefore, can be laid down, which will govern all the different classes of cases, which may thus arise, as to the sufficiency or insufficiency of an answer in this respect. A man may have an undoubting belief of a fact, or he may disbelieve its existence, or he may believe it highly probable, or merely probable, or the contrary, or he may have no belief whatsoever, as to it. In each of these cases, he is bound to

[1] 2 Daniell Chan. Prac. 257; Id. 402; Gresley on Evid. 19, 20; *Potter* v. *Potter* (1 Ves. 274); *Carth* v. *Jackson* (6 Ves. 37, 38); Story on Eq. Plead. § 854.

[2] 2 Daniell Ch. Pr. 257; Id. 402; Coop. Eq. Pl. 314; Harris. Ch. Pract. by Newl. ch. 31, p. 181.

[3] Ibid.

[4] 2 Daniell Ch. Prac. 257; *Amhurst* v. *King* (2 Sim. & Stu. 183).

[5] Gresley on Evid. 2d edit. 1837.

answer conscientiously, as to the state of his mind, in the matter of his belief; and if he does, that is all, which a Court of Equity will require of him. If a man truly states, that he cannot form any belief at all respecting the truth of the fact or information, that is sufficient, and it puts the plaintiff upon proof of it. If, on the other hand, the defendant should state (as in the present case the defendant does in effect state), that he "has no knowledge, information, or belief, that the fact or information inquired about, is not true," or if he states (as in the present case), that he has been informed by a party, and verily believes, that such party did not possess any knowledge, information, or belief of the fact, which the interrogatory points out; in each of these cases, it seems to me, that the answer, if expressive of the true state of mind of the defendant, might at least, for some purposes, be held sufficient. But, then, if such language were unaccompanied by any other qualifications, or explanations, I should understand, that the defendant did mean to assert his belief of the truth of the information or statement of fact, because, if he had no knowledge, information, or belief, that it is not true, he must be presumed to give credit to it; and if he did not intend so to be understood, it would be his duty to say in express terms, that he had no belief about the matter; and he ought not to be allowed to shelter himself behind equivocal, or evasive, or doubtful terms, and thereby to mislead the plaintiff to his injury. And this leads me to remark, and it is the real and only point of difficulty, which I have felt upon the exception, whether, although the plaintiff may agree to take and accept such an admission, interpreting it as affirmative of the defendant's belief, if in that sense it would be beneficial to himself, he is positively bound to receive it, when it is clearly susceptible of a different, or even of an opposite interpretation, which may affect the nature and extent of his proofs at the hearing of the cause. Upon full reflection, I think, that he is not positively bound to receive it, although certainly I should interpret it as an affirmative, if it would be favorable for the plaintiff; but he has a right to require, that the defendant should state in direct terms, or, at least, in unequivocal terms, either that he does believe, or that he does not believe the matter inquired of, or that he cannot form any belief, or has not any belief concerning the matter, and according as the answer shall be the one way or the other, that he

calls upon the plaintiff for proof thereof, or he admits it, or he waives any controversy about it.

Upon this ground my opinion is, that the exception is well founded, at least, as to some of the allegations in the answer. It may, perhaps, be sufficient for the Court merely in this general manner to intimate its present opinion upon the case; and it will be easy for the counsel to make its application to the various parts of the answer complained of. But to make myself more clearly understood, I wish to give an illustration of the principle, drawn from the present bill and answer, especially as the nature of the objection may thereby be seen in a more strong and exact light.

The object of the bill is to obtain, among other things, a perpetual injunction to a suit now pending, on the Law side of this Court, brought by the defendants in the bill (Byam and others) against the plaintiff (Brooks), for violation of a patent, which they claim title to, as assignees of the patentee; and, among other charges, the bill for this purpose alleges, that the original patentee (Alonzo D. Phillips) had before his assignment to these parties assigned a limited right therein to one John Brown, under whom the defendant claims a still more limited title, as a sub-purchaser *pro tanto,* and insists that his acts done in supposed violation of the patent, are rightfully done under this sub-title. The patent is alleged to bear date on the 24th of October, 1837; the assignment to Brown, on the 2d of January, 1837; the assignment to Brooks, on the 18th of September, 1837; but it was not recorded until the 15th of July, 1839; and the assignment to Byam, on the 28th day of July, 1838, under whom the other defendants (Whitney and others) derive title, which was only recorded within the time prescribed by law, whereas the assignment to Brown was not. Under these circumstances the bill charges, that Byam at the time of the assignment to him and the other defendants (and, among them, Whitney) at the time of the assignment to them by Byam, had knowledge and information, and good cause of belief of the prior assignment to Brown. And in the interrogatory part of the bill the defendants are required "full, true, direct, particular, and perfect answer and discovery to make, and that not only according to the best of their knowledge, but to the best of their respective information, hearsay, and belief, to all and singular the matters and allegations and charges aforesaid."

Now, the answer of the defendant, Whitney (which is excepted

to), states, that he (the defendant) does not of his own knowledge know, whether, at the time of the assignment to Byam, he (Byam) had any information, or knowledge, or had any cause to believe, that Phillips had previously made any conveyance to Brown, or Brown to the plaintiff (Brooks) as alleged in the bill; but this defendant has been informed by said Byam, that at the time, when the said Phillips conveyed and assigned to him all his right and interest in and to the patent right, the said Byam had no knowledge, information, or cause to believe, that the said Phillips had made any conveyance to the said Brown, or that the said Brown had made any conveyance to the complainant; and this defendant has no knowledge, information, or belief, that the information so derived from the said Byam is not true. Now, it is to the matter and form of this last clause (and a like allegation is to be found in other parts of the answer), that the objection is taken by the exception. The argument is, that the clause is ambiguous; that it does not assert, in direct terms, that the defendant believed or disbelieved the statement of Byam; or that the defendant had no belief, or was unable to form any belief about the matter, and, therefore, required the plaintiff to prove the knowledge, information, or belief of Byam at the time of the assignment to him. So that, in fact, the defendant, by the form of his allegation, does not positively put the asserted fact in controversy, as to the knowledge, information, or belief of Byam, by affirming his own belief of Byam's statement; neither does he dispense with the proof thereof, by denying his own belief thereof; neither does he assert, that he is unable to form any belief upon the subject, and therefore calls for proof of the allegation of the bill on this point; but he leaves the matter in a state of ambiguity and open to different interpretations, as to the true intent and meaning of the answer.

It appears to me, that in this view the exception is well founded. When the defendant says, that he "has no knowledge, information, or belief, that the information so derived from the said Byam is not true," he merely pronounces a negative, which may, indeed, in some sort amount to a negative pregnant, *arguendo,* that, as he has no information or belief, that it is not true, therefore he believes it to be true, which would certainly be a natural, although not an irresistible presumption. But it seems to me, that the plaintiff has a right to more than this; to know, whether the defendant himself has placed confidence in the statement or not,

or whether his mind hangs *in dubio,* and he is unable to form any belief either way. In the latter case, certainly, less evidence would be necessary to infer presumptively the knowledge, information, or belief of Byam himself, than if the defendant himself believed Byam's statement, and acted upon that belief; for a Court is not bound, in favor of a defendant, to have a more confident belief in a party, than the defendant himself professes to have. But what I rely on is, that the defendant, by such a form of answer, leaves it entirely equivocal, whether he believes, or is unable to form any belief; and the plaintiff has a right to know positively, which of the two is his real predicament.

The exception, therefore, on this point, ought to be allowed.

Stafford v. *Brown, 4 Paige Ch. (N. Y.) 88. (1833.)*

This case came before the court upon exceptions to the master's report allowing certain exceptions to the defendants' answer.

THE CHANCELLOR:

The question which arises upon the five first exceptions allowed by the master, is, whether there are any allegations or interrogatories in the complainant's bill to authorize him to call upon the defendants to answer the several matters of those exceptions. In the case of *Whitmarsh* v. *Morris & Campbell,* and in some other cases, none of which have been reported, this court decided that exceptions to an answer for insufficiency could not be sustained, unless there was some material allegation, charge or interrogatory contained in the bill, which was not fully answered. That where new matter, not responsive to the bill, was stated in the answer, if such matter was wholly irrelevant and formed no sufficient ground of defence, the complainant might except to the answer for impertinence, or might raise the objection at the hearing. All the writers on the subject of equity pleading, lay down the principle, distinctly, that exceptions for insufficiency are founded upon the supposition that some material allegation, charge or interrogatory in the complainant's bill, is not fully answered. In Lord Redesdale's Treatise it is said, that if the complainant conceives an answer to be insufficient to the charges contained in the bill, he may take exceptions to it, stating such parts of the bill as he

conceives are not answered, and praying that the defendant may in such respects put in a full answer to the bill. (Mitf. Pl. 4 Lond. ed. 315.)* Cooper says, the exceptions for insufficiency are to be in writing, stating the parts of the bill which the complainant alleges are not answered. (Cooper's Pl. 319.) Newland also says, that exceptions for insufficiency are allegations in writing, stating the particular points or matters in the bill which the defendant has not sufficiently answered. (1 Newl. Pr. 3 Lond. ed. 259.) And Lube, in his analysis of the principles of equity pleading, says the exception must state the precise points in the bill unanswered, or which are imperfectly answered. (Lube's Eq. Pl. 87.) Although it may not be necessary in the exception to state the precise words of the allegation, charge or interrogatory in the bill, which is not fully answered, yet the substance at least must be stated; so that by referring to the bill alone, in connection with the exception, the court may see that the peculiar matters to which a further answer is sought, are stated in the bill, or that such an answer is called for by the interrogatories. (See *Hodgson* v. *Butterfield,* 2 Sim. & Stu. 236.) As the general denial of all the matters of the bill not before answered, with which the answer usually concludes, is sufficient as a pleading to put the several matters of the bill in issue, the principal object of the exceptions for insufficiency is to examine the defendant on oath, for the purpose of discovery merely. For this purpose the complainant may even anticipate the defence of the defendant, and may obtain a

*An insufficient answer, is no answer. (*M'Laughlin's Adm'r* v. *Daniel,* 8 Dana, 184.) [*Vide* 8 Ves. 87; Story's Eq. Pl. 465, 469, 646, 647, 648, 649.] It has been held that an answer clearly evasive on its face, and no reason assigned, should be considered a contempt of court. (Ib.) [*Vide* 14 Ves. 415.] Where an answer is believed to be designedly defective, for the purpose of imposing on the plaintiff the burthen of proving what the defendant is, in conscience, bound to admit, the proper course is to except to the answer, and compel the defendant to put in a complete one. (*Lunn* v. *Johnson,* 3 Iredell's Eq. Rep. 70.) An exception to an answer for insufficiency, should state the charges in the bill, the interrogatory applicable thereto, to which the answer is responsive, and the terms of the answer verbatim. (*Brooks* v. *Byam,* 1 Story's Rep. 297.) Exceptions to an answer do not lie for irregularities in the practice. (*Vermilyea* v. *Christie,* 4 Sandf. Ch. Rep. 376.) By excepting for insufficiency, the complainant necessarily assumes that the answer is valid, and properly before the court. (Ib.) The verification of an answer taken abroad, it was alleged, was not properly authenticated, whereupon the complainant excepted to certain portions of the answer for insufficiency, relying solely upon its being no answer, by reason of the defect in its verification. Held, that he had mistaken his remedy, which was by moving to take it from the files of the court. (Ib.)

discovery of matters connected with such defence, which are in nowise responsive to the main charges in the bill upon which the complainant's equity is supposed to rest. The proper method of obtaining such discovery, however, is not by exceptions for insufficiency founded upon the answer alone, but by framing the bill in such a manner as to call for all the particulars of the defence which it is supposed the defendant will set up. This is effected by what is usually called the charging part of the bill, in which the anticipated defence is stated as a pretence of the defendant, supported by proper charges and interrogatories founded upon such alleged pretence. In this way the complainant is not only enabled to anticipate the defence itself, by putting other matters in issue which will have the effect to displace the equity thereof, but he is also enabled to examine the defendant on interrogatories in relation to all the particulars of such defence. (Mitford, 43; Lube's Eq. Pl. 241, 268.) By an amendment of the bill the complainant may generally effect the same object, even after the defendant has put in an answer setting up such defence.

In the case under consideration the complainant, in his bill, has stated the recovery of a judgment against the defendant E. Brown, on which an execution has been returned unsatisfied. But as he has left the question of present indebtedness to be presumed, as an inference of law arising from the facts thus stated, the defendants were not called upon to do more than to admit the facts as stated in the bill. The admission, however, did not preclude them from rebutting this legal presumption of indebtedness by setting up, as a distinct matter of defence, the payment of the judgment either wholly or in part. But as this part of the answer was not called for by the bill and was not responsive to anything contained therein, it would be no evidence in favor of the defendants unless established by proof. If the complainant had stated in the bill that the defendants pretended that E. Brown had paid the whole or part of the judgment, and charged that such pretence was unfounded, he might in the interogatory part of the bill, have called for all the particulars as to the time, place, amount and manner of such pretended payment. But in that case the answer would have been evidence in favor of the defendants, as to the matters they were thus called upon to answer. Nothing should be permitted to remain in an answer, which is neither called for by the bill, nor material to the defence or with reference to any

decree or order which may be made in the cause. But the proper mode of making the objection to any such immaterial statement with a view to have it expunged, is by excepting to the answer for impertinence.

As the whole of the discovery called for by the five first exceptions allowed by the master, was founded upon new matters set up by the defendants in their answer, by way of defence, those exceptions should have been disallowed.

The matters of the ninth, twelfth and thirteenth exceptions, are fully answered, so far as any foundation was laid for those exceptions by the allegations in the bill; and so far as the exceptions went beyond the bill they were inadmissible. So much of the master's report as was excepted to by the defendants, must therefore be overruled, with costs. And if the complainant does not think proper to amend his bill within ten days, as authorized by the 190th rule of this court, the defendants must answer the matters of the eighth, tenth and eleventh exceptions within the time specified in the report of the master.

CHAPTER VII.

FURTHER PROCEEDINGS ON PART OF PLAINTIFF.

Replication.

Mason v. *Hartford Ry. Co., 10 Fed. Rep. 334. (1882.)*

In Equity. Decision upon defendants' motions to strike replications from the files, and to dismiss bill of revivor, and upon complainants' motion to withdraw replications, and amend bill of revivor.

Colt, D. J.:

In this cause a bill of revivor was filed August 14, 1880, by the alleged administrators and trustees of Earl P. Mason, the original complainant. To this bill one of the defendants, William T. Hart, put in a plea, setting up that it did not appear by said bill of revivor that the plaintiffs named therein had ever been appointed administrators of said estate by any court of competent jurisdiction in the state of Massachusetts, and that therefore the plaintiffs had no right to file said bill, that the court had no jurisdiction thereof, and praying that the bill might be dismissed. The New York & New England Railroad Company, another defendant, demurred to the bill upon this as well as other grounds. To this plea and demurrer the complainants in the bill of revivor filed separate replications, setting out, among other things, that since the filing of the plea and demurrer they had been appointed administrators of the estate of the said Earl P. Mason in the state of Massachusetts.

The defendant William T. Hart now moves—First, that the replication to his plea be stricken from the files, because it is special, and sets up new matter, and matter accruing after the filing of the bill of revivor; and, second, that the bill of revivor be dismissed, because the complainants have not taken issue on the plea, nor set the same down to be argued, though the same has been filed more than a year.

The New York & New England Railroad Company also move

that the replication to the demurrer be stricken from the files, and that the bill of revivor be dismissed, because the complainants have not set the demurrer down for argument, though filed over one year before.

It is apparent that the replications here filed are special, setting up new matter, and matter accruing since the filing of the bill of revivor; therefore they are irregular. By equity rule 45, of the United States court, "no special replication to any answer shall be filed."

In *Vattier* v. *Hinde,* 7 Pet. 252, 274, the supreme court declare that no special replication can be filed except by leave of the court; holding it to be contrary to the rules of a court of chancery for the plaintiff to set up new matter necessary to his case by way of replication; that omissions in a bill cannot be supplied by averments in the replication; and that a plaintiff cannot be allowed to make out a new case in his replication. This is equally true whether it is an answer or plea that is replied to. See Daniell Ch. Pl. & Pr. (4th Ed.) 828, note 1. "Matters in avoidance of a plea, which have arisen since the suit began, are properly set up by a supplemental bill, not by a special replication"; citing *Chouteau* v. *Rice,* 1 Minn. 106. In Mitford & Tyler, Pl. & Pr. in Eq. 412, 413, we find, "special replications, with all their consequences, are now out of use, and the plaintiff is to be relieved according to the form of the bill, whatever new matters have been introduced by the defendant's plea or answer." The replications to the plea and demurrer cannot be sustained.

The second motion of the defendants, that the bill of revivor be dismissed, is based upon equity rule 38, which provides that if the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

It appears in this case that the bill of revivor was filed August 14, 1880; the plea and demurrer, September 6, 1880; the replications, July 30, 1881; and that soon after (August 4th) the plaintiffs' counsel asked the court to fix a day for the argument. It further appears that after the filing of the plea and demurrer, September 6, 1880, a stipulation was entered into by counsel upon

both sides extending the time for hearing to the November rule-day, 1880, meantime the complainants to be allowed to file proper pleadings in reply to said plea and demurrer. By further written arguments between counsel the postponement provided for by this stipulation was extended monthly until February, 1881. Then we find a further stipulation as follows:

"It is hereby agreed that no movement on either side shall be made in this cause until May, 1881, without prejudice to complainants' right to file evidence of appointment as administrators in Boston."

By the affidavit of Mr. Payne, one of complainants' counsel, it appears that in October or November, 1880, Mr. Lothrop, one of defendants' counsel, stated, in effect, that while he would sign the stipulation, the complainants' counsel might take their own time about bringing the case to a hearing.

In the light of all these circumstances it is fair to presume that complainants' counsel understood that any rigid enforcement of the rule now invoked had been waived, impliedly by acts and conduct, if not in express terms; and we are of this opinion.

Considering the repeated postponements which had taken place, for the mutual accommodation of both sides, so far as appears, the language used by defendants' counsel as to time of hearing; and bearing also in mind that the replications were filed within three months after May, 1881; and that within a week thereafter the plaintiffs moved the court to set a time for hearing,—it would, we think, be inequitable to allow the defendants' motion to dismiss to prevail. Indirectly, as bearing on this question of laches, reference is made to the fact that the original bill in this case was brought in 1871, the answer filed in 1873, the replication not put in until 1875; also, that the original complainant died in 1876, and that the bill of revivor was not brought until 1880. In answer to this charge, the complainants say that the delay has been owing to the pendency of another suit in the state court of Rhode Island, the determination of which might affect the prosecution of this suit, and that, consequently, the delay was acquiesced in by both sides. They further state that within a short time after the final decision by the Rhode Island state court the bill of revivor was filed, and that they are now anxious to speed the cause. Under these circumstances, and in the absence of any motion on the part of the defendants to speed the cause, we do not see how the charge

of laches can be seriously pressed; at last, so far as the present motion is concerned.

The complainants, in the event of their replications being held to be bad, ask leave to withdraw them, and to amend their bill of revivor by inserting, among other things, the fact that they were on the twenty-fifth day of July, 1881, by the court of probate for the district of Suffolk, in the state of Massachusetts, duly appointed administrators of the estate of Earl P. Mason. The defendants object, upon the ground that this is new matter, accruing since the filing of the bill, which cannot be set up by amendment, but only by supplemental bill. It is true that events which have happened since the filing of a bill cannot be introduced by way of amendment, and that as a general rule they may be set out by supplemental bill. Equity Rule 57, U. S. Court.

In Daniell, Ch. Pl. & Pr. (4th Ed.) 1515, note 1, we find "an original bill cannot be amended by incorporating anything therein which arose subsequently to the commencement of the suit. This should be stated in a supplemental bill." And again, on page 828, note 1 (already cited), it is laid down that matters in avoidance of a plea, which have arisen since the suit began, are properly set out by a supplemental bill. Mitford & Tyler, Pl. & Pr. in Eq. 159; Story Eq. Pl. § 880. But in this case it is difficult to see how a supplemental bill can be brought. This bill of revivor has not become defective from any event happening after it was filed. But originally, when it was brought, it was wholly defective; for the fact that the plaintiffs were appointed administrators by the proper court in Massachusetts was necessary to its maintenance. *Mellus* v. *Thompson,* 1 Clif. 125. And yet this event happened, as the record discloses, nearly a year after it was brought. If the bill is wholly defective, and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental bill, founded upon matters which have subsequently taken place. *Candler* v. *Pettit,* 1 Paige Ch. 168.

In *Pinch* v. *Anthony,* 10 Allen, 471, 477, the court observe:

"We have found no authority that goes so far as to authorize a party, who has no cause of action at the time of filing his original bill, to file a supplemental bill in order to maintain his suit upon a cause of action that accrued after the original bill was filed, even though it arose out of the same transaction that was the subject of the original bill." Daniell Ch. Pl. & Pr. (4th Ed.) 1515, note.

We are of the opinion that this new matter cannot be incorporated in the bill of revivor by amendment, nor introduced in a supplemental bill, and that the proper cause for the complainants to pursue is to bring a new bill of revivor.

(1) The defendants' motion to strike from the files complainants' replications to plea and demurrer is granted. (2) The defendants' motion to dismiss bill of revivor is denied. (3) The complainants' motion to amend bill of revivor is denied.

Brown v. *Ricketts, 2 Johns. Ch. (N. Y.) 425. (1817.)*

BILL for a legacy, filed the 3d of October last. The defendants put in their answer the 13th of December, and the plaintiff filed his replication the 4th of January last. The plaintiff now presented a petition for leave to withdraw the replication, to enable him to except to the answer, and to amend his bill.

The petition was not sworn to: a copy of it, with notice of the motion, was duly served on the solicitor of the defendants.

An affidavit of the plaintiff's solicitor, made since the service of the notice of the motion, a copy of which had not been served on the defendants' solicitor, was produced, stating, that the replication was filed through misapprehension, on the ground that the answer was sufficient, arising from his perusal of an imperfect and incorrect draft of the bill; and that he had since discovered that the bill filed charged the matters which he supposed were omitted, and which were not fully answered.

The affidavit of the defendants' solicitor stated, that the answer filed was a full answer to the bill; that since the cause was at issue, no step had been taken by the plaintiff; and that, on the 21st of March, he entered rules to produce witnesses, and to show cause against publication.

THE CHANCELLOR:

The petition states two objects of the motion for leave to withdraw the replication; the one is, to except to the answer; the other, to amend the bill.

As to the first object; the plaintiff does not state, in his petition, wherein the answer is defective, nor why the defects, if any, were not discovered before. It is now upwards of three months since

the replication was filed. There is, indeed, an affidavit presented on making the motion, but that affidavit was not served on the opposite solicitor, and if notice of the motion was requisite at all (which is not disputed), a copy of the affidavit on which it was founded ought equally to have been served. The affidavit is, therefore, not regularly before me on this motion; and even if it were, the reason therein assigned for the motion is not sufficient. The plaintiff's solicitor says, he filed the replication through misapprehension, inasmuch as he mistook an incorrect draft of the bill for the corrected copy on file, and that the answer, though good as to the former, is not as to the latter. But this affidavit does not disclose wherein, or to what extent, the answer is insufficient, nor when the variation between the draft of the bill, and the one on file, was discovered, nor in what that variation consists. The excuse itself is feeble and imperfect. The solicitor to the bill compares the answer with some defective draft of his own bill, and now comes, three months after the cause it put at issue, with such a plea of negligence, and with all this want of precision and regularity in bringing forward the motion, for leave to file exceptions to the answer. This would be granting an unreasonable indulgence, and one leading to vexation and delay in the prosecution of a suit. It was said, by Lord Hardwicke, in *Pott* v. *Reynolds,* 3 Atk. 565, that the Court rarely grants leave to withdraw the replication, unless there be some special cause shown to induce the Court to grant this indulgence; and the books say, that as the replication admits the sufficiency of the answer, it is not usual for the Court to allow the plaintiff to withdraw it, for the purpose of excepting to the answer. (Wyatt's P. R. 202. Cooper's Eq. Pl. 328.) The reasons for such an application should be clearly stated, and be of sufficient import, and the laches of the plaintiff fully accounted for. The rules of the Court allow only three weeks to except to the answer. The policy of the rule is to make the party vigilant, and oblige him to look early and well to the answer. If the object of the motion was only to set down the cause for hearing, on bill and answer, I presume that it would be much, of course, according to the late case of *Cowdell* v. *Tatlock,* 3 Vesey & Beame, 19.

The other object of the present motion is to amend the bill. The petition states, that the bill is materially defective; but the affidavit of the plaintiff's solicitor states, that the bill fully charges the matters which he, at first, thought had been omitted, and the

same solicitor now states, in support of his motion, that the bill is full, and that the only amendment desired is one of mere form, and requiring no further answer. It will readily be perceived, that this is not sufficient ground for withdrawing a replication several months after is has been filed. To withdraw the replication for the purpose of amending the bill, the plaintiff must show the materiality of the amendments, and why the matter to be introduced by the amendment was not stated before, otherwise the rules of the Court to prevent vexatious delays of the plaintiff would be nugatory. *(Longman* v. *Calliford,* 3 Anst. 807.)

The motion is, accordingly, denied, with costs.

CHAPTER VIII.

DECREES.

Nature, Effect, Amending and Enforcing.

Hughs v. *Washington, 65 Ill. 245. (1872.)*

Appeal from the Circuit Court of Cook county; the Hon. Wm. W. Farwell, Judge, presiding.

Mr. Justice Walker delivered the opinion of the Court:

These cases present substantially the same questions, and we, therefore, consider them as one. They were brought by the heirs of John A. Washington against George R. H. Hughs and the heirs of Sanderson Robert. The bills were filed to set aside and annul contracts of sale of large and valuable real estate in the city of Chicago, by Hughs, as the agent of Washington's heirs, to Robert. The ground alleged for rescinding the contract was fraud.

The cases were heard together, in the circuit court of Cook county, on the 6th day of May, 1871. The evidence was very voluminous, and consisted largely of letters sent and received by the various parties, depositions and other documentary evidence.

After the hearing was had, it is claimed that the court below decided the cases in favor of the complainants, but, before any decree was rendered or enrolled, the fire of October of that year destroyed the court house and all the papers in the cases, both pleadings and evidence.

Counsel agreed upon and restored the pleadings in the cases. The defendant then made a motion for time to retake and restore all of the destroyed evidence, and urged their right to have the evidence restored and on file before a decree should be passed and filed for record or recorded.

The motion of the defendants was denied, and the court, from memory of the evidence, pronounced a decree in each case, and they were duly enrolled and became final. From that decree the defendants appeal, and assign the refusal of the court to stay the rendition of the decree until the evidence could be restored, as one

of the errors in the case; and, from the view we take of the case, we deem it unnecessary to consider any other.

According to the ancient practice in the English court of chancery, the decree recited at length the entire pleadings in the case, and the substance of the evidence contained in the depositions. That practice has been slightly modified in that court in modern times, but its decrees still contain full recitals. In our courts of chancery, the practice has permitted, but not required, such recitals, especially of the evidence. The practice has obtained neither in Great Britain nor this country to set out the depositions in full, but simply to recite the substance of the evidence they contain pertinent to the issue.

As the practice in chancery has always required the evidence to be in writing, or if oral, to be reduced to writing, and preserved in the record, it is apparent that the old practice of embodying it in the decree was not material, as it could at all times be referred to for the purpose of seeing upon what the decree was based, and whether it was sustained by the evidence; and hence, our practice dispensed with embodying it in the decree. But the practice, as modified, does not dispense with the absolute necessity of preserving the evidence in the record. *White* v. *Morrison,* 11 Ill. 361; *Wilhite* v. *Pearce,* 47 Ill. 413; Hill's Ch. Pr. 319, and numerous other cases, recognize the rule.

On an appeal from the decree, each party has the right to rely upon the evidence heard in the court below, to test the correctness of the conclusions at which the court has arrived; and, in such a case, the finding of the facts in the decree will be controlled by the evidence in the record, where it appears that it has all been preserved. The appellate court will look into the record to see whether the evidence warrants the court in its action in finding the facts stated in the decree, and if, from all the evidence that was heard, it appears the chancellor erred in the finding of the facts, the appellate court will disregard the findings, and will be controlled by the evidence. Under the ancient practice, the decrees in these cases would have contained a complete record of the case, and from it alone the appellate court could have determined whether error had intervened; and if the evidence had been preserved in the record, the same result would follow where a complete record is presented for consideration. But in the position the case now occupies, the defendant has no power to show that the facts

found by the chancellor in the decree are not warranted by the evidence.

It is an undoubted right, enjoyed by every litigant, to have the judgment or decree to which he is a party passed upon and reviewed by an appellate court. This, the constitution has guaranteed to him; nor can the courts, by rules of practice, deprive him of the right, or materially impair its efficiency. And, in all common law cases, under our statute, it is the duty of the party desiring to have the case reviewed on the evidence, to preserve it in the record, or the presumption will be indulged that the court below acted properly in its decision. Not so with a decree, as no presumption is indulged beyond the extent to which it is sustained by the proofs appearing in the record. Hence, it devolves upon the party in whose favor it is rendered to preserve evidence that will sustain the decree, or it must find that facts were proved that will sustain the decree, or it will be reversed.

Did the court below act prematurely in rendering these decrees before the evidence was restored?

It is contended that inasmuch as the chancellor had heard the evidence, and had announced what his decision would be, and had written out a statement of the grounds for the decision, it must be considered that the case was finally decided, and nothing remained but the formal matter of drawing and passing the decree. This is manifestly not the correct view of the question. Under the English practice, after the hearing is had, the chancellor pronounces his decree, and the registrar takes minutes of it, and they are usually read over by him to the parties, or their solicitors, and copies of such minutes are generally applied for and furnished to the parties. If not satisfactory, by reason of their uncertainty, or that anything has been omitted, and the registrar refuses to correct them, application may be made to the court to correct them. After the minutes are settled, the decree is then drawn up by the registrar, and delivered to the party who demanded it. "The decree having been returned, and an office copy taken by the adverse party, the next step to be taken is to have it passed and entered; till which is done, the decree is only *inchoate*." 2 Daul. Ch. Pr. 670. But this practice has not, in form, obtained in this State.

But our practice is, in principle, the same. The decree is *inchoate* until it is approved by the chancellor and filed for record, or shall be recorded, which answers to the passing and entering it,

in the English court. The mere oral announcement of the chancellor of his decision, and the grounds upon which it is based, or the reducing them to writing, is no more than the minutes taken, in the English practice. The whole matter is completely under the control of the chancellor until the final decree has been filed or recorded. Until that time, he may alter, amend, change, or even disregard, all that he had said in his minutes; and if, upon further reflection, he became satisfied his conclusions were wrong, it would be his duty to reverse his announcement, and to decree as he was convinced the equities of the case required; or if, upon further reflection, he should doubt the correctness of his conclusion, he has the undoubted right to order a rehearing, on his own motion, at any time before he has passed the decree, and it has been filed for record, or has been spread upon the record. But after that is done, the whole matter is beyond his control, unless it be on a bill of review, or a bill to impeach the decree, or some such subsequent proceeding. It is then, and not till then, that it is the decree of the court, and is *res adjudicata.*

There was, then, no decree of the court until it was approved and filed for record, or was recorded; and that was the time the case was decided and the decree was rendered; and there was at that time, as a matter of fact, no evidence upon which to base the decree. Had the fire occurred, and the papers been destroyed before the court heard the evidence read, no one would pretend the court could have, after its destruction, rendered a decree until the testimony was restored, or if the evidence had been but partly read to the court, the same would be undeniably true; and we presume it would not be claimed that the court could have proceeded to decree, had the evidence been destroyed after it was heard by the court, and before he had announced what decree he intended to render; and, as we have seen, that announcement concluded no one, nor did it legally bind the court to adhere to the announcement.

The case, it is true, was before the court for decision, but was not finally decided until the decree was filed for record; and we have seen that there was no evidence at that time upon which to base the decree.

The court below should have allowed the evidence to be supplied before the decree was passed and filed. It was the only means by

which their right of appeal could be rendered availing to the parties.

The destruction of the evidence was occasioned by one of those public calamities for which the parties were in nowise responsible; and such being the case, neither of them should be prejudiced by it, beyond what can not be repaired.

We are clearly of opinion that the court below erred in rendering the decree until the evidence was restored; and, for that reason, the decree of the court below must be reversed and the cause remanded, with leave to appellants to restore the evidence, and, for that purpose, the court below will give them a reasonable time.

Decree reversed.

La. Bank v. *Whitney, 121 U. S. 284. (1887.)*

This was a motion to dismiss for want of jurisdiction. The case is stated in the opinion of the court.

Mr. Chief Justice Waite delivered the opinion of the court.

This is a proceeding begun May 22, 1883, by Mrs. Myra Clark Gaines, then in life, to subject a certain sum of $40,000 on deposit in the Louisiana National Bank to the payment of a judgment in her favor against the City of New Orleans. There is no dispute about the fact that the money in question was on deposit when the proceeding was begun and the bank served with process, but the Board of Liquidation of the City Debt has made claim to it as part of the fund appropriated by Act No. 133 of 1880 to the payment and liquidation of the bonded debt of the city. Pending the determination of the questions involved, the court, March 15, 1886, ordered the money paid into the registry of the court. From this order the bank has appealed, and also sued out a writ of error, and the Board of Liquidation has likewise appealed. The representatives of Mrs. Gaines, who were made parties to the proceeding after her death, now move to dismiss both the writ of error and the appeals, because the order to be brought under review is not a final judment or decree within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error.

We have no hesitation in granting the motion. The court has

not adjudicated the rights of the parties concerned. It has only ordered the fund into the registry of the court for preservation during the pendency of the litigation as to its ownership. Such an order it has always been held is interlocutory only and not a final decree. *Forgay* v. *Conrad,* 6 How. 204; *Grant* v. *Phœnix Ins. Co.,* 106 U. S. 431. If in the end it shall be found that the fund belongs to the Board of Liquidation, it can be paid from the registry accordingly, notwithstanding the order that has been made. The money when paid into the registry will be in the hands of the court for the benefit of whomsoever it shall in the end be found to belong to.

Both the appeals and the writ of error are dismissed.

Winthrop Iron Co. v. *Meeker, 109 U. S. 180. (1883.)*

APPEAL from the Circuit Court of the United States for the Western District of Michigan.—Motion to dismiss the appeal.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a motion to dismiss an appeal because the decree appealed from is not a final decree. The motion papers show that the appellees, Meeker, Brown, and Brooks, a minority of the stockholders of the Winthrop Iron Company, on or about the 12th of November, 1881, filed a bill in equity in the Circuit Court of the United States for the Western District of Michigan against the Winthrop Iron Company, the Winthrop Hematite Company, and certain directors of the Iron Company who were the stockholders of the Hematite Company, the object and purpose of which was to set aside as fraudulent and void the proceedings of the stockholders of the Iron Company at a meeting held in Chicago on the first of October, 1881, and to have a receiver appointed to take possession of the property of the company and manage its affairs. The effect of the proceedings of the meeting complained of was, as alleged, to authorize a lease of the property of the Iron Company to the Hematite Company from and after the first of December, 1882, for the personal advantage of the majority stockholders of the Iron Company, regardless of the rights of the minority. The stockholders of the Hematite Company were also elected directors of the Iron Company, and constituted

a majority of the board. On the second day of October, 1882, the cause was submitted to the court upon the pleadings, proofs, and arguments of counsel. From the proofs it appeared that notwithstanding the pendency of the suit, the Iron Company had, on the 30th of November, 1881, executed a lease to the Hematite Company, according to the vote of the stockholders. On the 6th of April, 1883, a decree was rendered which, in effect, adjudged that the proceedings of the meeting were in fraud of the rights of the minority stockholders, and that the lease which had been executed in accordance with the authority then given was "null and void, for the fraud of the defendants, the Winthrop Hematite Company and the St. Clair Brothers," the majority stockholders and directors of the Iron Company, "in procuring the same." By the same decree a receiver was appointed to take charge of and manage the business of the Iron Company, evidently because a majority of the board of directors, after the election at the October meeting, were considered unfit to control its affairs, as their personal interests were in conflict with the interests of the company. Both the Iron Company and Hematite Company, as well as the defendant directors of the Iron Company, were ordered to "forthwith surrender and deliver to" the receiver all the property of the Iron Company, and "all corporate records and papers." The receiver was fully authorized to "continue the management of the business of the . . . company, with power to lease or operate its mines and plants until the further order of the court." The decree further ordered an accounting before a master by the Hematite Company and the defendant directors of the Iron Company, for all profits realized from the use of the leased property after the 1st of December, 1882, the date of the beginning of the term under the lease which had been set aside. There was also an order for an accounting by the defendant directors "concerning the ores mined by them, and the royalty upon such ores due and owing by them to the . . . company, and concerning the rights and obligations of the lessor and lessee, under and according to a lease mentioned in the bill, . . . expiring on December 1st, 1882." At the foot of the decree is the following: "And the court reserves to itself such further directions as may be necessary to carry this decree into effect, concerning costs, or as may be equitable and just." From this decree the appeal was taken.

In our opinion the decree as entered is a final decree, within the meaning of section 692 of the Revised Statutes, regulating appeals to this court. The whole purpose of the suit has been accomplished. The lease made under the authority of the meeting of October, 1881, has been cancelled, and the management of the affairs of the company has been taken from the board of directors, a majority of whom were elected at that meeting, and committed to a receiver appointed by the court, plainly because, in the opinion of the court, the rights of the minority stockholders would not be safe in the hands of directors elected by the majority. In order that the receiver may perform his duties, the defendants are required to turn over to him the entire property and records of the company. The accounting ordered is only in aid of the execution of the decree, and is no part of the relief prayed for in the bill, which contemplated nothing more than a rescission of the authority to execute the fraudulent lease, or a cancellation of the lease if executed, and a transfer of the management of the affairs of the company from a board of directors, whose personal interests were in conflict with the duty they owed the corporation, to some person to be designated by the court. The litigation of the parties as to the merits of the case is terminated, and nothing now remains to be done but to carry what has been decreed into execution. Such a decree has always been held to be final for the purpose of an appeal. *Bostwick* v. *Brinkerhoff,* 106 U. S. 3, and the cases there cited. In *Forgay* v. *Conrad,* 6 How., at p. 204, it was said by Chief Justice Taney, for the court:

"And when the decree decides the right to the property in contest, and directs it to be delivered by the defendant to the complainant, ... and the complainant is entitled to have such a decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the circuit court as is necessary for the purposes of adjusting, by a further decree, the accounts between the parties pursuant to the decree passed. This rule, of course, does not apply to cases where money is directed to be paid into court, or property to be delivered to a receiver, or property held in trust to be delivered to a new trustee appointed by the court, or to cases of a like description. Orders of that kind are frequently and necessarily made in the

progress of a cause. But they are interlocutory only, and intended to preserve the subject-matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be adjudicated by a final decree."

Here the rights of the Hematite Company and the defendant directors of the Iron Company have been adjudicated and definitely settled. Their lease, which was in reality the subject-matter of the action, has been cancelled, and a delivery of the leased property to the Iron Company has been ordered. The complainants are entitled to the immediate execution of such a decree. The receiver to whom the delivery is to be made was not appointed to hold the property until the rights of the parties could be adjudicated, but to stand, subject to the direction of the court, in the place of and as and for the corporation, because, under the circumstances, the corporation is incapacitated from acting for itself. His position is like that of the guardian of the estate of an incompetent person. He represents the Iron Company, and a delivery of the leased property to him is a delivery in fact and in law to the company itself; that is to say, to the party for whose use the suit was prosecuted. The complainant stockholders sue for the company, and the delivery to the receiver is a delivery to the company that has been adjudged to be entitled to immediate possession, notwithstanding the lease to the Hematite Company. The defendant directors have not in form been removed from their office, but their power as directors has been taken from them, and they are no longer able to carry into effect the orders of the stockholders made in fraud of the rights of the minority at the meeting in October. A new officer has been appointed to stand in the place of the directors as manager of the affairs of the company. In the words of Mr. Justice McLean in *Craighead* v. *Wilson,* 18 How., at p. 201, the decree is final "on all matters within the pleadings," and nothing remains to be done but to adjust the accounts between the parties growing out of the operations of the defendants during the pendency of the suit. The case is altogether different from suits by patentees to establish their patents and recover for the infringement. There the money recovery is part of the subject-matter of the suit. Here it is only an incident to what is sued for.

The motion to dismiss is denied.

Giant Powder Co. v. *Cal. Powder Co., 5 Fed. Rep. 197. (1880.)*

IN EQUITY. Petition for rehearing.

FIELD, C. J.:

This case was heard by me whilst holding the circuit court in San Francisco, in the month of September last, and was decided on the twelfth of October following. The decision was against the complainant, and a decree was entered dismissing the bill. The complainant's counsel now present to me at Washington a petition for a rehearing.

The case was elaborately argued at the circuit, counsel occupying several days in the presentation of their views. Their arguments were taken down by a short-hand writer, and printed, thus enabling me to read what I had patiently listened to in the oral discussion.

The question before the court was the validity of the re-issued patent to the complainant. The main objection urged to its validity was that it was for a different invention from that described in the original patent. And upon that point the argument was full, elaborate, and able. It is difficult to see how the position of the complainant in support of the patent could have been more cogently presented.

The original patent was for a compound of nitro-glycerine, with an inexplosive porous absorbent, which would take up the nitro-glycerine, and render it safe for transportation, storage, and use, without loss of its explosive power. The re-issued patent is for a compound of nitro-glycerine with any porous absorbent, explosive or inexplosive, which will be equally safe for transportation, storage, and use, without loss of explosive power. In other words, the re-issued patent drops the limitation of the original, and seeks to cover all compounds in which nitro-glycerine is used, in connection with a porous absorbent, in the production of blasting powder, thus practically securing to the patentee a monopoly of nitro-glycerine in the manufacture of that powder. The court held that the re-issued patent was, therefore, more extensive in its scope than the original patent, and on that ground was invalid. It covered a different invention.

The court also held that the original patent was neither invalid

nor inoperative from any defective specification, but was valid and operative for the invention described; and that this appeared upon a comparison of the two patents, the re-issued patent differing from the original only in the extent of its claim; and that, therefore, the commissioner exceeded his jurisdiction in granting a re-issue at all, as well as on the ground that the re-issued patent was for a different invention. This latter position was not, it is true, discussed in the oral argument, but it is raised by the pleadings, and the attention of complainant's counsel at San Francisco was called to it, and a note of authorities on the point was received from him, embracing the greater part of those mentioned in the petition for rehearing. Whether the position be well taken or not cannot affect the decision of the case, if the re-issued patent cover a different invention from that described in the original patent.

But the petition cannot now be considered by me at Washington. It is not an *ex parte* proceeding; it can only be presented on notice, and can only be considered after the other side has had an opportunity to answer it. The *ex parte* presentation by counsel has evidently been made from a failure to distinguish between an application for rehearing after the decision of an appellate tribunal, and an application for a rehearing in a court of original jurisdiction after entry of a final decree. The distinction between applications for rehearing in the two cases is pointed out by Chief Justice Taney, in *Brown* v. *Aspden,* 14 Howard, 26: "By the established rules of chancery practice," said the chief justice, "a rehearing, in the same sense in which that term is used in proceedings in equity, cannot be allowed after the decree is enrolled. If the party desires it, it must be applied for before the enrollment. But no appeal will lie to the proper appellate tribunal until after it is enrolled, either actually or by construction of law; and, consequently, the time for a rehearing must have gone by before an appeal could be taken. In the house of lords in England, to which the appeal lies from the court of chancery, a rehearing is altogether unknown. A reargument, indeed, may be ordered, if the house desires it for its own satisfaction. But the chancery rules in relation to rehearings, in the technical sense of the word, are altogether inapplicable to the proceedings on the appeal.

"Undoubtedly, this court may and would call for a reargument where doubts are entertained, which it is supposed may be removed by further discussion at the bar. And this may be done

after judgment is entered, provided the order for reargument is entered at the same term. But the rule of the court is this—that no reargument will be heard in any case after judgment is entered, unless some member of the court who concurred in the judgment afterwards doubts the correctness of his opinion, and desires a further argument on the subject. And, when that happens, the court will, of its own accord, apprise the counsel of its wishes, and designate the points on which it desires to hear them."

According to the practice in the supreme court, if the court does not, of its own motion, desire a rehearing of a case decided, counsel are at liberty to submit without argument a brief petition or suggestion of the points upon which a rehearing is desired. If, then, any judge who concurred in the decision thinks proper to move for a rehearing, the motion is considered by the court; otherwise, the petition is denied, of course. *Public Schools* v. *Wallace,* 9 Wall. 604.

A similar course of procedure would be appropriate in any appellate tribunal. To allow an argument upon such a petition would lead, in a majority of cases, to a mere repetition, with more or less fullness, of the points presented on the original hearing, and cause infinite delays to the prejudice of other suitors before the court.

There is another observation to be made upon rehearings in equity after a final decree in courts of original jurisdiction. The practice in this country and that which formerly prevailed in England are essentially different. According to the practice in the English courts, a rehearing previous to the enrollment of the decree, when the petition was approved by the certificate of two counsel, was granted almost as a matter of course. Repeated rehearings in the same cause were not uncommon, and the consequent delays and expenses from this practice were so great as to lead to the interposition of parliament for its correction. This subject is mentioned by Chief Justice Taney in his opinion in the case in Howard. There, when a case was decided, memoranda for the decree were entered in the minutes of the court; in some instances the final decree was thus entered; but the decree was not considered as strictly a record until it was engrossed, signed, and entered at length in the rolls of the court. Between the time of the decision and the entry of memoranda for the decree, and the time the decree took a definite shape by enrollment, it was open

to modification and correction, and even to entire change. But when once enrolled the decree was not subject to change except in the house of lords, or by a bill of review. 2 Daniell's Chancery Practice, 1018.

In this country there is not, except, perhaps, in one or two states where the old forms of equity practice are retained, any such proceeding as the formal enrollment of decrees. Here, when a case in equity is decided, a decree is drawn up and signed by the judge, and entered on the records of the court, with about the same formality as a judgment in a case at law. And rehearings are then granted, except when the judge acts of his own motion, only upon such grounds as would authorize a new trial in an action in law; that is, for newly-discovered evidence or errors of law apparent upon the record. All the limitations which control courts in actions at law, in considering allegations of newly-discovered evidence and of errors at law, apply to applications for rehearing in such cases. *Bentley* v. *Phelps,* 3 W. & M. 403. See, also, *Doggett* v. *Emerson,* 1 W. & M. 1; *Emerson* v. *Daniels,* Id. 21; *Tufts* v. *Tufts,* 3 W. & M. 426; and also *Clapp* v. *Thaxter,* 7 Gray, 386.

The course of procedure for the complainant, therefore, is to file its petition with the clerk of the circuit court at San Francisco, and obtain from the court or circuit judge an order upon the defendants to show cause on the following rule day, or some other day mentioned, why its prayer should not be granted. The defendants can then answer the petition, and upon the petition and answer the application can be heard. A rehearing should not be granted for newly-discovered evidence where the evidence could have been obtained by reasonable diligence on the first hearing, nor when it is merely cumulative to that previously received, nor when, if presented, it would not have changed the result. And as to errors of law, they should be such as are clearly shown by considerations not previously presented. A new hearing should not be had simply to allow a rehash of old arguments. The proper remedy for errors of the court on points argued in the first hearing is to be sought by appeal, when the decree is one which can reviewed by an appellate tribunal. See *Tufts* v. *Tufts, supra.*

The petition, therefore, cannot be heard by me *ex parte* at Washington. The complainant must pursue the regular course of procedure, and give notice to the opposite party. If the peti-

tion be filed during the term, the court will retain jurisdiction over the case, and may subsequently decide upon the application. The eighty-eighth rule in equity applies only where no petition is presented during the term.

As the circuit court in San Francisco will be held by the circuit judge in my absence, he will direct its clerk to forward the petition and answer to me, at Washington, accompanied with such briefs as counsel may file within a reasonable time to be allowed by the court. The application will then be taken up and disposed of, and my judgment sent to the circuit court and there entered. Where cases have been heard by the circuit judge sitting alone, I do not myself hear applications in them for a rehearing, or motions for a new trial, except by his request. This consideration to the different judges composing the court is essential to the harmonious administration of justice therein. As observed by me in a case reported in 1 Sawyer: "The circuit judge possesses equal authority with myself on the circuit, and it would lead to unseemly conflicts if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case." Page 689.

The petition contains what purports to be a copy of my opinion, but it is a copy of the opinion before it was revised. The opinion should not have been published until it had received my revision, as counsel very well know. In any petition hereafter filed it is expected that a correct copy will appear, if any one is given. If the present petition is used, the opinion must be corrected in accordance with the revised copy.

Before concluding, it may not be amiss to invite the attention of complainant's counsel to the language of Judge Story, in the case of *Jenkins* v. *Eldridge,* with respect to the earnestness with which counsel, in applying for rehearings, sometimes asseverate their convictions of the errors of the court; and, to repeat what is there said, "that if any judge should be so unstable in his views, or so feeble in his judgment, as to yield to them, he would not only surrender his independence, but betray his duty. However humble may be his own talents, he is compelled to treat every opinion of counsel, however exalted, which is not founded in the law and the facts of the case, to be voiceless and valueless." 3 Story, 303. Nothing can be gained by the strong language expressed by counsel in presenting the petition as to the supposed errors of the court,

nor by the statement as to what may have been said of the decision by other counsel, who have neither examined, studied, nor understood the case.

Rider v. *Kidder, 12 Ves. Jr. 202. (1806.)*

A MOTION was made by the Plaintiff, for a short Order upon the Defendant, to transfer the stock under the Decree in this cause; and that service upon the Clerk in Court may be good service.

Mr. Bell, for the Defendant, opposed the Motion; insisting upon the general rule, that nothing can be done for the purpose of bringing a man into contempt without personal service. An attachment will not issue, except upon personal service of the writ of execution of the Decree; and the Court giving the indulgence of a short Order, which is not the regular process of the Court, will not put the Defendant in a worse situation.

The Solicitor-General [Sir Samuel Romilly], and Mr. Hart, in support of the Motion, took the distinction, that, this application being for service of the writ of execution of the Decree, the Defendant being present in Court, must have had notice; and the only object of requiring personal service is to prevent surprise. It was observed, that the reason of applying for a short Order is to prevent expense.

The Lord CHANCELLOR [ERSKINE]:

The practice in this Court, that in order to fix a person with contempt, the service must be personal, has a strong analogy to the practice in Courts of Common Law upon attachment. The service must be personal, unless upon some very special application it is dispensed with; which may be under circumstances certainly. The reason of requiring personal service is, *non constat,* that there is a contempt; that the party knows, that he has neglected to do any thing he was called upon to perform. But in this instance, a Decree made, when the Defendant was present in Court, she knows, she has not done what she was directed to do, and must therefore

be conscious, that she is in contempt. If this course cannot be taken, the Defendant might, when called upon to pay money, keep out of the way; and so prevent the effect of a Decree or Order made, when he was present in Court.

The same point arising in the case of *De Manneville* v. *De Manneville,* the Order in this case was postponed; that the practice might be looked into.

CHAPTER IX.

AMENDMENTS, BILL OF REVIEW, NE EXEAT, PRODUCTION OF PAPERS, ABATEMENT, ETC.

Amendments.

Verplanck v. *Mercantile Co., 1 Edwd. Ch. (N. Y.) 46. (1831.)*

In this case, Ogden Edwards, Esq. as Vice-Chancellor of the first circuit, had granted a general injunction, and allowed of the appointment of a receiver. Appeals were had; and by an order of the Chancellor, dated at Albany, on the twenty-first day of June, 1831, the orders granting the injunction and appointing a receiver were vacated with costs. The following is a part of the Chancellor's order:—"*It is ordered,* that the said orders granting a general injunction in the said bill and appointing a receiver in this cause be and the same are hereby reversed and vacated, with costs on the appeals therefrom, to be paid by the respondents to the solicitor of the appellants. *And it is further ordered,* that the proceedings be remitted back to the Vice-Chancellor of the first circuit; with permission to the complainants to apply to the said Vice-Chancellor to amend their bill of complaint so as to make the corporation of the Mercantile Insurance Company defendants therein,* and otherwise as they may be advised, upon due notice

*The prayer in the original bill went against the President and Directors of the Mercantile Insurance Company of New York, whereas the style of the Company, by the act of incorporation (April 10, 1818), was, The Mercantile Insurance Company of New York. In the opinion which his Honor the Chancellor gave, in relation to setting aside the orders for the injunction and a receiver, he says, "The first objection is, that although the order appointing a receiver purports to have been entered in a suit against 'The Mercantile Insurance Company of New York,' under which order the appellants have been deprived of the possession of their property, they were not, in fact, parties defendant in the bill; as the prayer of process was only against the officers of the corporation. The name of the corporation is as before stated. The prayer for process is, that the subpœna may be directed to the president and directors of said company. This was undoubtedly owing to the mistake of the solicitor who drew the bill; and who probably did not intend to make the president or directors, but only the corporation and Joseph Barker, parties to the suit. The same mistake exists as to the prayer for the injunction; and is also carried into the order granting the injunction. So that the injunction in fact is neither against the corporation nor its officers, by their proper names. As this objection is merely

to the solicitor of the appellants, and of Jacob Barker, of such application; and upon such amendment being made, an order may be entered, directing the defendants to show cause before the said Vice-Chancellor, at such time and upon such notice as he shall direct, why a general or other injunction should not be granted and a receiver be appointed," &c. &c.

A petition, in the names of the complainants, was this day presented to the court. It mentioned the suit; the appeals from the orders before mentioned; and the reversal of those orders, referring also to a copy of the Chancellor's order, which was annexed. Also, the necessity of amending their bill. The proposed amendments were set forth in a schedule. The petitioners further showed, that the additional facts contained in the said amendments and schedules, so far as the same differed from the original bill, had been discovered since the filing thereof, and were truly stated, according to the best information and belief of the petitioners. The prayer of the petition was in these words:—"Your petitioners therefore pray leave to amend their said bill, by striking out that part of the said bill, after the words, *as by reference to the said*

formal, I should not feel disposed to sustain it, if the difficulty could be obviated by an amendment. As it now stands, it may deprive the appellants of a substantial right. It is somewhat doubtful whether they have the power to answer this bill. It neither prays process against the corporation, nor calls upon them to answer. For, by another singular oversight of the solicitor, that part of the bill merely prays the confederates may answer upon their corporal oaths. Whereas, the officers of the corporation, and not the company, are charged with confederacy; and they only could put in their answer on their oaths. It is well settled, that no persons are parties as defendants in a bill in chancery, except those against whom process is prayed, or who are specifically named and described as defendants in the bill. (1 Marsh. Ken. Rep. 594. 2 J. C. R. 245. 2 Dick. R. 707.) In *Elmendorf* v. *Delancey*, 1 Hopk. R. 555, Chancellor Sandford says, when it is uncertain who are the complainants, or who are the persons called to answer, the suit is fundamentally defective, and if the parties are not clearly designated, it is the fault of him who institutes the suit.' In answer to this objection, it was suggested by the respondents' counsel, that it is a mere misnomer of the corporation, and can only be taken advantage of by a plea in abatement. It cannot, however, in this case, be considered a misnomer. The name of the corporation and the substance of the charter is distinctly stated in the commencement of the bill, and the process is then prayed against the officers only. Besides, the appellants never had an opportunity to make the objection by plea of abatement or in any other form. As the true name of the corporation was stated, the objection appeared on the face of the bill, and no plea was necessary to bring the fact to the notice of the court." "The proceedings must be remitted back to the Vice-Chancellor of the first circuit, with permission to the complainants to apply to him for leave to amend their bill, so as to make the corporation defendants therein; and otherwise as they may be advised," &c.

act will more fully and at large appear, in the sixth page of said bill, to the words *as in duty bound,"* &c. in the twenty-third page thereof; and "insert the proposed amendment hereto annexed, marked B; and that the said schedules referred to as such, be taken as a part of said amended bill; and that one or more of the complainants be permitted to verify by oath, in the usual way, the said amended bill; or, for such other and further order in the premises as to your honor shall seem meet."

All the complainants resided in the city of New York; but the petition was only signed and sworn to by their solicitor; *Jurat*: "F. S. K., solicitor for the complainants in this cause, being duly sworn, says, that he has read the foregoing petition, and knows the contents thereof: that the same is true of his own knowledge, except as to the matters therein stated to be upon his information and belief, and as to those matters he believes it to be true. F. S. K. Sworn, &c."

THE VICE-CHANCELLOR:

A motion is made on the part of the complainants, for leave to amend their bill, which was sworn to at the time it was filed, and upon which, *ex parte,* an injunction was granted and a receiver appointed. The orders allowing the injunction and appointing the receiver, were, upon appeal, reversed: with permission to the complainants to apply for leave to amend the bill, so as to make the corporation of the Mercantile Insurance Company defendants therein; and otherwise, as they might be advised.

The application to amend is accordingly made; and besides inserting the name of the company, the complainants propose to strike out the whole stating part of the bill (except the recital of the charter), the interrogating part and the prayer; and to insert, as a substitute, and by way of amendment—not a statement of a new matter entirely—but a restatement of the original matter in a different phraseology; leaving out some of the allegations or portions thereof; introducing some new and additional matter; specifying, in some instances, dates and times where none were mentioned before, omitting the whole of the particular interrogatories, and restating the prayer of the bill although, in substance and effect, the same as is contained in the original.

The question is, as this is a sworn bill, whether amendments can be admitted in this way and to the extent here proposed? In

considering this question, it is necessary to distinguish between an amendment and matter which would constitute a new bill; for under the privilege of amending, the party is not to be permitted to make a new bill. Amendments can only be granted when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case but not forming the substance itself. This is the principle laid down in *Lyon* v. *Tallmadge,* 1 J. C. R. 184; and it applies to all bills and to pleadings in general in this court. When it comes to be applied to injunction bills or to bills and answers which have been sworn to, other regulations adopted for the prevention of mischief are to be observed. Thus in *Rodgers* v. *Rodgers,* 1 Paige's C. R. 424, upon an application to amend an injunction bill, the Chancellor held, that the amendments proposed must be merely in addition to the original bill and not inconsistent with it; and the complainant must swear to the truth of the matter proposed to be inserted by way of amendment and show a valid excuse for not having incorporated it in the original bill. And the latter branch of this rule was strictly adhered to in the subsequent case of *Whitmarsh* v. *Campbell,* 2 Paige's C. R. 67. It is contended, however, that the rule in these cases, is to be confined to injunction bills, that is to say, to cases where an injunction has been issued and is actually pending and where the complainant asks for leave to amend without prejudice to the injunction—as was the case in *Rodgers* v. *Rodgers* —and that it does not apply, where a bill has merely been sworn to and no injunction is outstanding upon it. But I apprehend it is not to be thus limited in its application; and that the delay which would be occasioned by allowing amendments after an injunction and in some instances after an answer put in, is by no means the only reason for the rule.

Another and more important reason for holding a strict hand over the privilege of amending sworn pleadings is, to check all temptation to falsehood or perjury, by not permitting a party who has once made his allegations or statements under oath to come in at any time and expunge the same or substitute other and different matter. If, indeed, it clearly appears there has been a mistake arising from inadvertency or accident, and that the statement is not what the party thought it was or intended it should be at the time of swearing to the pleading, the court will

permit him to amend upon discovery of the error. But, even in such cases, the court will not suffer the amendment to be made by striking out any part of the pleading. It can only be done by introducing an additional or supplemental statement explaining and correcting the former erroneous one. Thus, in *Jennings* v. *Merton College,* 8 Ves. 79, a motion was made to take the answer off the file, upon the ground of a mistake which had occurred in it. The Lord Chancellor refused the application, saying, the safest way would be to file an additional answer, giving the explanation so that the court might have the whole before it, without letting any thing go out of the record. And this course was sanctioned in the subsequent cases of *Dolder* v. *The Bank of England,* 10 Ves. 284, and *Wells* v. *Wood,* ib. 401; and several others. The same question came under consideration in *Bowen* v. *Cross,* 4 J. C. R. 375, where Chancellor Kent, upon a review of all the English cases, held it to be not only settled, but the safer and wiser practice, not to permit any thing to be struck out of an answer, even where a mistake was clearly shown, but (for the purpose of correcting it) to give the party leave to file a supplemental or additional answer —thereby leaving to the parties the effect of what had been sworn before, with the explanation given by the supplemental answer. A perusal of his opinion in that case will show the extreme caution with which the court permits even this to be done. He says, "there can be no doubt that the application ought to "be narrowly and closely inspected, and a just and necessary case clearly made out."

If then, as respects amending an answer, the court is to be thus watchful to prevent any thing from being stricken out, though introduced unintentionally and through mistake, is it not necessary to be equally particular in regard to a sworn bill, which a complainant may seek to amend in an important and material part? In some respects, the comparison may not hold good; for the occasions are much more frequent for amending bills than answers —and therefore a greater latitude should be given in the former cases. Yet it will be perceived that the occasions for amending bills, in which it is necessary to exhibit a greater indulgence, generally arises from a discovery of a defect in the proper parties, in the prayer for relief, or in the omission of some fact or circumstance rendered necessary to be introduced in consequence of the defendant's answer (and which a complainant may be permitted

to introduce, especially where the defendant, upon exceptions, is bound to make further answer) and where the matter for amendment does not affect the substance of the case made by the bill. Where the object of the amendments is to alter or change the substance of the bill, I hold that the same strictness should be required as where an answer is in question. The complainant may amend by introducing new parties; and by making such new charges, allegations and statements, in addition to the former, as he can verify by his oath, and which are not inconsistent with his former allegations. These are the true and legitimate purposes for which leave to amend may be granted; and it cannot be extended, with any sort of propriety, to the striking out of former allegations and substituting others, although they may not be very different in substance and effect. It has been urged that *Renwick* v. *Wilson*, 6 J. C. R. 81, contains a different doctrine, and that Chancellor Kent, if he has not so decided, has there, at least, sanctioned the idea that parts of a sworn bill may be expunged for the purposes of amendment—and that too, without prejudice to an injunction, provided the part expunged does not constitute the ground upon which the injunction rests. I do not, however, understand him as going that length. On the contrary, he expressly limited the amendments, which he permitted to be made in that case, to additions to the bill; by "inserting such additional statements, matters and charges as the plaintiff should be advised "were material;" and this was done without prejudice to the injunction. At the same time, he says, he could not allow any part of the bill to be stricken out, without a previous specification of the parts intended to be omitted. It would seem from this expression, he considered the court might, in the exercise of its discretion, permit an amendment by striking out: but I apprehend this permission should in no case be extended beyond the mere formal parts of a bill, and that the Chancellor in that case did not mean to be understood as intimating an opinion that any material or substantial allegation of fact, sworn to, might, at the instance of the party who made it, be withdrawn or obliterated, so that, if guilty of perjury no vestige of it might remain.

No court of justice or equity ought, for one moment, to tolerate a practice, which would hold out to the designing an opportunity to commit and yet escape from this crime. By thus adverting to the danger of such a practice, I do not wish to be understood as

reflecting in the slightest degree upon the complainants. I am bound to believe and do believe the present application is made from pure and honest motives, the better to enable them to present their case. My object in these observations is merely to show, that if the bill is permitted to be amended to the extent proposed, it will be establishing a precedent dangerous in practice—and the consequences of which might be a reproach to the court. The only safe and true rule, in my judgment, is the one adopted in *Rodgers* v. *Rodgers;* and I see no reason for confining its application to the case of an injunction bill having a writ of injunction outstanding. It applies, with equal force, to all cases of sworn bills; and I must, therefore, hold that no bill which has been sworn to in this court can be amended by striking out the whole or any portion of the stating part and recasting it in different phraseology, with some omissions of former charges, and the addition of some new matter. This, instead of being an amendment in the technical sense of the term, would be converting it into a new bill: and which the complainants can resort to, if they please.

Other objections have been urged against the present application, namely, that the proposed amendments are not verified by the oath of the complainants or of any of them; and also, that the complainants have not sworn as to the information (upon which the new matter is founded) having come to their knowledge since the filing of the original bill. The petition is verified by the affidavit of the solicitor only; and no reason is given, why the complainants or some one of them have not sworn to it. I am strongly inclined to think it is insufficient; and that, on this ground alone, the court would be compelled to deny the motion. I have thought it my duty, nevertheless, to examine the case and to express my opinion upon the other and principal question; and the result is, that I cannot give the complainants permission to amend, in the way proposed. All I can do upon this application is, to let them amend by inserting the corporate name of the Mercantile Insurance Company in the place of the President and Directors: but it must be upon the payment of the costs of opposing this motion.

The amendment was made accordingly.

As to the costs of opposing the above motion:

Mr. Jacob Barker presented to the Vice-Chancellor, as taxing officer a bill of costs on his own part. His honor decided, he could

not tax Mr. Barker any costs for his opposition, he not being an officer of the court: the Revised Statutes having made provision only for fees to "counsellors" and "solicitors." 2 R. S. 629, 630.

Thorn v. *Germand, 4 Johns. Ch. (N. Y.) 363. (1820.)*

MOTION to amend the bill, by adding new and material charges, after issue joined, a rule to produce witnesses, a commission to take testimony sued out, and one witness examined. The petition stated, that after issue joined, and while the solicitor for the plaintiffs was preparing to take testimony, the matter proposed to be introduced by way of amendment, was discovered. The affidavit, as to the above facts, was sworn to by the solicitor for the plaintiffs.

To oppose the motion, an affidavit of G. B., a third person, was produced, stating, that before the filing of the bill he communicated to one of the plaintiffs, the material fact proposed by way of amendment, viz. the entry of a judgment in the Supreme Court.

THE CHANCELLOR:

The application should have been for leave to withdraw the replication, for the purpose of amending the bill. No amendment can be allowed, going to the merits, while the replication remains. (1 Atk. 51. 1 Ves. jun. 142. Newland's Pr. 82.) And if that had been the motion, the materiality of the amendment, and why the matter was not stated before, must have been shown, and satisfactorily explained. (*Brown* v. *Ricketts,* 2 Johns. Ch. Rep. 425. *Turner* v. *Chalwin,* cited in 1 Fowler's Ex. Pr. 113.)

In this case, it is proved, on the part of the defendants, and it is not denied by the plaintiffs, that they, or one of them, knew the existence of the matter now sought to be introduced into their bill, before the filing of the bill. It is, therefore, not new matter, that is to be added by way of amendment, but matter before resting in the knowledge of the party.

There is another fatal objection to the motion. Here has been a witness already examined in the cause. If no witness had been examined, an amendment, otherwise proper, and when the omission was duly accounted for, might have been permitted, for it has been permitted after publication. (*Hastings* v. *Gregory,* cited in Mitf. Pl. 258. and 1 Fowler's Ex. Pr. 111.) But after the examination

of witnesses, the pleadings cannot be altered or amended, except under very special circumstances, or in consequence of some subsequent event, unless it be for the sole purpose of adding parties. This is the established rule of practice on the subject. (Mitf. Pl. 258, 259.) The only course for the plaintiff, in these cases, when he cannot have permission to alter his original bill by amendment, is to apply for leave to file a supplemental bill. (*Shephard* v. *Merril,* 3 Johns. Ch. Rep. 423.)

Motion denied with costs.

BILL OF REVIEW.

Dexter v. *Arnold, 5 Mason, 303. (1829.)*

PETITION to file a bill for the purpose of obtaining a review of a decree, rendered in this Court at a former term, in the case of *Edward Dexter* v. *Thomas Arnold.* (See *ante,* Vol. III. p. 284.)

The original bill, filed at the November Term, 1821, charged Thomas Arnold, as surviving partner, joint owner, trustee, and agent of his brother Jonathan Arnold, and as administrator upon his estate. Upon the bill, answer, and exhibits, an interlocutory decree passed, for the defendant to account upon oath, with directions to the master as to the mode of taking an account, and allowing the plaintiff to surcharge and falsify the stated accounts exhibited by the defendant. A report was made by the master at the June Term, 1823, and a final decree entered for the plaintiff at the following November Term, for five hundred dollars sixty-six and a half cents.

The grounds, presented by the petition for a review of that decree, were, the discovery of new facts showing, that several sums of money had come into the hands of the defendant, belonging to Jonathan Arnold, which were not entered in Thomas Arnold's accounts, nor allowed by the master, and that several claims, made by Thomas Arnold and allowed by the master, were without foundation and erroneous.

STORY, J.:

The present is a somewhat novel proceeding in this Circuit; and I am not aware, that in any other Circuit of the United States,

any general course of practice has prevailed, which would supercede the necessity of acting upon this, as a case of first impression, to be decided upon the general principles of Courts of Equity.

It comes before the Court upon a petition for leave to file a bill of review of a decree rendered in this Court at November Term, 1823, principally upon the ground of a discovery of new matters of fact. The petition was filed at November Term, 1827, and affidavits have been read in support of it. Counter affidavits have also been admitted on the other side, not for the purpose of investigating or absolutely deciding upon the truth of the statements in the petition; but to present, in a more exact shape, some of the circumstances growing out of the original proceedings, which may assist the Court in the preliminary discussion, whether leave ought to be granted to file the bill of review. This course, though not very common, is, as I conceive, perfectly within the range of the authority of the Court;[1] and may be indispensable for a just exercise of its functions, in granting or withholding the review. If, indeed, it were doubtful, in case the bill of review should be allowed, whether the defendants could by plea or answer traverse the allegation in such bill, that the matter of fact is new, I should not hesitate to inquire, in the most ample manner, into the truth of such allegation, before the bill was granted, in order to prevent gross injustice. But as every such bill of review must contain an allegation, that the matter of fact is new, it seems to me clear upon principle, that, as it is vital to the relief, it is transversable by plea or answer, and must be proved, if not admitted at the hearing. In *Hanbury* v. *Stevens* (1784), cited by Lord Redesdale (Redesd. Pl. Eq. 80) [3d edition, 70], the Court is reported to have held that doctrine. The case of *Lewellen* v. *Mackworth* (2 Atk. R. 40; Barnard, Ch. R. 445), though very imperfectly, and, as I should think, inaccurately reported, seems to me to support the same conclusion. It has been relied on by the best text writers for that purpose.[2] Lord Redesdale, in his original work on Equity Pleadings (Redes. Eq. Pl. 80, 2d edition), stated the point, as one which may be doubted; but upon principle I cannot see, how that can well be. And in the last edition,

[1] See *Livingston* v. *Hubbs*, 3 Johns. Ch. R. 124; *Norris* v. *Le Neve*, 3 Atk. 25.

[2] Redesd. Pl. Eq. 231 (3d edition); Coop. Eq. Pl. 305; Montague, Eq. Pl. 335, note; Id. 336; 2 Montague, Eq. Pl. 227, Note 100.

(the third), revised by his Lordship, I find that he has questioned the propriety of such a doubt.[3]

Before I proceed to consider the particular grounds of the present petition, it may be well to glance at some of the regulations, which govern Courts of Equity in relation to bills of review, that we may be better enabled to judge of their application to the Courts of the United States. The ordinance of Lord Bacon constitutes the foundation of the system, and has never been departed from. It is as follows: "No decree shall be reversed, altered, or explained, *being once under the great seal,* but upon a bill of review. And no bill of review shall be admitted, except it contain either error in law, *appearing in the body of the decree,* without further examination of matters of fact, or some *new matter,* which hath arisen after the decree, and *not any new proof, which might have been used, when the decree was made.* Nevertheless, upon *new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed,* a bill of review may be grounded by the *special license* of the Court, and not otherwise." [4]

A bill of review, therefore, lies only, when the decree has been enrolled under the great seal in chancery. If it has not been so enrolled, then for error of law apparent upon the decree the remedy is by a petition for a re-hearing.[5] But if the ground of the bill is new matter, discovered since the decree, then the remedy is by a supplemental bill in the nature of a bill of review, and a petition for a re-hearing, which are allowed by special license of the Court.[6] This distinction between a bill of review and a bill in the nature of a bill of review, though important in England, is not felt in the practice of the Courts of the United States, and perhaps rarely in any of the State Courts of Equity in the Union. I take it to be clear, that in the Courts of the United States all decrees as well as judgments are matters of record, and are deemed to be enrolled as of the Term, in which they are passed. So that the appropriate remedy is by a bill of review.

[3] Redesd. Pl. Eq. 70 (3d edition).
[4] Beame's Orders in Chancery, 1.
[5] *Perry* v. *Phelips*, 17 Vez. 173, 178.
[6] Redesd. Eq. Pl. 65, [78] 81; Coop. Eq. Pl. 88, 89, 90, 91; Beame's Orders in Chan. 2 and 3, notes; *Sheffield* v. *Duchess of Buckingham*, 1 West. R. 682; Montag. Pl. Eq. ch. 12, p. 330; *Norris* v. *LeNeve*, 3 Atk. 26; *Perry* v. *Phelips*, 17 Vez. 173; *Blake* v. *Foster*, 2 B. & Beatty, 457, 460.

In regard to errors of law, apparent upon the face of the decree, the established doctrine is, that you cannot look into the evidence in the case in order to show the decree to be erroneous in its statement of the facts. That is the proper office of the Court upon an appeal. But taking the facts to be, as they are stated to be on the face of the decree, you must show, that the Court have erred in point of law.[7] If, therefore, the decree do not contain a statement of the material facts, on which the decree proceeds, it is plain, that there can be no relief by a bill of review, but only by an appeal to some superior tribunal. It is on this account, that in England decrees are usually drawn up with a special statement of, or reference to, the material grounds of fact for the decree.[8] In the Courts of the United States the decrees are usually general. In England the decree embodies the substance of the bill, pleadings, and answers; in the Courts of the United States the decree usually contains a mere reference to the antecedent proceedings without embodying them. But for the purpose of examining all errors of law, the bill, answers, and other proceedings are, in our practice, as much a part of the record before the Court, as the decree itself; for it is only by a comparison with the former, that the correctness of the latter can be ascertained.

In regard to new matter, there are several considerations deserving attention. In the first place the new matter must be relevant and material, and such, as if known, might probably have produced a different determination.[9] In other words, it must be new matter to prove what was before in issue, and not to prove a title not before in issue;[10] not to make a new case, but to establish the old one. In the next place the new matter must have come to the knowledge of the party since the period, in which it could have been used in the cause at the original hearing. Lord Bacon's ordinance says in one part it must be, "after

[7] *Mellish* v. *Williams*, 1 Vern. R. 166; *Cranborne* v. *Delahay*, 2 Freem. R. 169; *Combs* v. *Prowd*, 1 Ch. Cas. 54; S. C. 2 Freem. R. 181; 3 Rep. Ch. 18; Hard. R. 174; *Perry* v. *Phelips*, 17 Vez. 173; *O'Brien* v. *Conner*, 2 B. & Beatt. 146, 154.

[8] *Combs* v. *Prowd*, 1 Ch. Cas. 54; *Brend* v. *Brend*, 1 Vern. R. 214; S. C. 2. Ch. Cas. 161; *Bonham* v. *Newcomb*, 1 Vern. R. 216; *O'Brien* v. *Conner*, 2 B. & Beatt. 146, 154.

[9] *Bennett* v. *Lee*, 2 Atk. 529; *O'Brien* v. *Connor*, 2 B. & Beatt. 155; *Portsmouth* v. *Effingham*, 1 Vez. 429.

[10] Coop. Eq. Pl. 91; *Patterson* v. *Slaughter*, Ambler R. 292; *Young* v. *Keighley*, 16 Vez. 348; *Blake* v. *Foster*, 2 B. & Beatt. 457, 462.

the decree:" but that seems corrected by the subsequent words, "and could not possibly have been used at the time when the decree passed," which point to the period of publication. Lord Hardwicke is reported to have said, that the words of Lord Bacon are dark; but that the construction has been, that the new matter must have come to the knowledge of the party *after publication passed* (*Paterson* v. *Slaughter,* Ambler. R. 293). The same doctrine was held in *Norris* v. *LeNeve* (3 Atk. R. 25, 34), and has been constantly adhered to since. A qualification of the rule quite as important and instructive is, that the matter must not only be new, but that it must be such as that the party, by the use of reasonable diligence, could not have known; for if there be any *laches* or negligence in this respect, that destroys the title to the relief. That doctrine was expounded and adhered to by Lord Eldon in *Young* v. *Keighley* (16 Vez. 348), and was acted upon by Lord Manners in *Barrington* v. *O'Brien* (2 B. & Beatt. 140), and *Blake* v. *Foster* (2 B. & Beatt. 457, 461). It was fully recognized by Mr. Chancellor Kent, and received the sanction of his high authority in *Wiser* v. *Blackley* (2 Johns. Ch. R. 488), and *Barrow* v. *Rhinelander* (3 Johns. Ch. R. 120). And in the very recent case of *Bingham* v. *Dawson* (3 Jac. & Walk. 243), Lord Eldon infused into it additional vigor.

Upon another point perhaps there is not a uniformity of opinion in the authorities. I allude to the distinction taken in an anonymous case in 2 Freem. Rep. 31, where the Chancellor said, that "where a matter of fact was particularly in issue before the former hearing, though you have *new proof* of that matter, upon that you shall never have a bill of review. But where a *new fact* is alleged, that was not at the former hearing, there it may be a ground for a bill of review." Now, assuming that under certain circumstances new matter, not evidence, that is, not in issue, in the original cause, but clearly demonstrating error in the decree, may support a bill of review, if it is the only mode of obtaining relief;[11] still it must be admitted, that the general rule is, that the new matter must be such as is relevant to the original case in issue. Lord Hardwicke, in *Norris* v. *Le Neve* (3 Atk. 33, 35),

[11] See *Norris* v. *Le Neve,* 3 Atk. 33, 35; *Roberts* v. *Kingsley,* 1 Vez. 238; *Earl of Portsmouth* v. *Lord Effingham,* 1 Vez. 429; Redesdale, Eq. Pl. 67, &c. (last edition.); 1 Montag. Pl. Eq. 332, 333; *Wilson* v. *Webb,* 2 Cox. 3; *Standish* v. *Radley,* 2 Atk. 177; see also Lord Redesdale's Observations in his third edition of his Equity Pleadings, p. 67.

is reported to have admitted, that a bill of review might be founded upon new matter not at all in issue in the former cause, which seems contrary to his opinion in *Patterson* v. *Slaughter* (Ambler, 293),[12] or upon matter, which was in issue, but discovered since the hearing. But the very point in 2 Freeman, 31 (if I rightly understand it), is, that a newly discovered fact is ground for a bill; but not newly discovered evidence in proof of any fact already in issue. This seems to me at variance with Lord Bacon's ordinance, for it is there said, that there may be a review upon "new matter, which hath arisen in time after the decree," and also "upon *new proof,* that has come to light after the decree made, and could not possibly have been used at the time when the decree passed." It is also contrary to what Lord Hardwicke held in the cases cited from 3 Atk. 33, and Ambler, 293. Lord Eldon, in *Young* v. *Keighley* (16 Vez. 348, 350), said, "The ground (of a bill of review) is error apparent on the face of the decree, or new *evidence* of a fact materially pressing upon the decree, and discovered at least after publication in the cause. If the fact had been known before publication, though some contradiction appears in the cases, there is no authority, that *new evidence* would not be sufficient ground." That was also the opinion of Lord Manners in *Blake* v. *Foster* (2 B. & Beatt. 457). Mr. Chancellor Kent, in *Livingston* v. *Hubbs,* (3 Johns. Ch. 124), adopted the like conclusion; and he seemed to think, that such new evidence must not be a mere accumulation of witnesses to the same fact; but some stringent written evidence or newly discovered papers. Gilbert, in his Forum Romanum, ch. 10, p. 186, leans to the same limitation, for he says, that in bills of review, "they can examine to nothing, that was in the original cause, unless it be matter happening subsequent, which was not before in issue, or upon matter of record or writing not known before, for if the Court should give them leave to enter *into proofs* upon the same points that were in issue, that would be under the same mischief as the examination of witnesses after publication, and an inlet into manifest perjury."[13]

[12]See also *Young* v. *Keighley*, 16 Vez. 348, 354; *Blake* v. *Foster*, 2 B. & Beatt. 457, 462.

[13]See also Barton, Eq. 216; *Tovers* v. *Young*, Prec. Ch. 193; *Taylor* v. *Sharp*, 3 P. Will. 371; *Standish* v. *Radley*, 2 Atk. 177; *Chambers* v. *Greenhill*, 2 Chan. Rep. 66; *Thomas* v. *Harvie's Heirs*, 10 Wheaton, R. 146.

There is much good sense in such a distinction, operating upon the discretion of the Court in refusing a bill of review, and I should be glad to know, that it has always been adhered to. It is certain, that cumulative written evidence has been admitted; and even written evidence to contradict the testimony of a witness. That was the case of *Attorney General* v. *Turner* (Ambler, 587). *Willan* v. *Willan* (16 Vez. 72, 88) supposes, that new testimony of witnesses may be admissible. If it be admissible (upon which I am not called to decide), it ought to be received with extreme caution, and only when it is of such a nature as ought to be decisive proof. There is so much of just reasoning in the opinion of the Court of Appeals of Kentucky on this subject, that I should hesitate long before I should act against it.[14]

In the next place it is most material to state, that the granting of such a bill of review is not a matter of right, but of sound discretion in the Court.[15] It may be refused, therefore, although the facts if admitted would change the decree, where the Court, looking to all the circumstances, deems it productive of mischief to innocent parties, or for any other cause unadvisable. *Bennet* v. *Lee* (2 Atk. 528), *Wilson* v. *Webb* (2 Cox, 3), and *Young* v. *Keighley* (16 Vez. 348), are strong exemplifications of the principle.

These are the principal considerations, which appear to me useful to be brought into view upon the present occasion. Let us now advert to the grounds upon which the petition is framed, and see how far any are applicable to them.

The original bill was brought against Thomas Arnold (whose administrator is now before the Court), for an account and settlement of his brother Jonathan Arnold's estate, upon which he had administered. The case is reported in the third volume of Mr. Mason's Reports, page 284, and I refer to that for a summary of the proceedings and final decree.

In preferring the present petition, the proper course of proceeding has been entirely mistaken. The present counsel for the petitioner is not responsible for those proceedings, they hav-

[14] See *Respass* v. *McClanahan*, Hardin, Ky. R. 342; *Head* v. *Head*, 3 Marsh. Ky. R. 121; *Randolph's Executors* v. *Randolph's Executors*, 1 H. & M. 180.

[15] *Sheffield* v. *Duchess of Buckingham*, 1 West. 682; *Norris* v. *Le Neve*, 3 Atk. 33; *Gould* v. *Tancred*, 2 Atk. 533.

ing taken place before he came into the cause. A petition for leave to file a bill of review for newly discovered matter should contain in itself an abstract of the former proceedings, the bill, answers, decree, &c. and should then specifically state what the newly discovered matter is, and when it first came to the party's knowledge, and how it bears on the decree, that the Court may see its relevancy and the propriety of allowing it.[16] The present petition, in its original form, contained nothing of this sort, but referred to an accompanying bill of review, as the one, which it asked leave to file, and then simply affirmed the facts stated in it to be true. This was sufficiently irregular. But upon looking into this bill of review the grounds of error are stated in a very loose manner, and in so general a form as to be quite inadmissible.

The first error assigned is in matter of law, and it is, that Thomas Arnold, the administrator, ought to have been charged with interest upon all sums of money, which he had received as administrator, because the said sums were used by him. The master in his report had declined to allow interest; and upon an exception taken the Court confirmed his report on this point. I see no reason for changing the decree on this point, for the reasons stated in the cause in 3 Mason, 288, 290; and there is no pretence to say, that there is any such proof of the use of the money in the report of the master, as justifies a different conclusion. There is no error in this respect apparent on the face of the master's report, or the decree. The allowance or disallowance of interest rests very much upon circumstances, and slight errors in this respect are not always held fatal.[17] There is no error apparent, therefore, on which a review ought to be granted. The next ground assigned is, that Thomas Arnold did receive large sums of money and other property, which he has not accounted for before the master, and for which he ought to account; and that since the decree, the petitioner hath discovered new and further evidence in relation thereto, which would have materially changed the report of the master and the decree. The petition does not state what the new evidence is, nor when discovered, and it is quite too vague for any order of the Court. The bill then proceeds, very irregularly, to require, that the ad-

[16] Coop. Eq. Pl. 92.
[17] See *Gould* v. *Tancred*, 2 Atk. 533.

ministrator of Thomas Arnold should answer certain interrogatories as to the cargoes of the ship Friendship. It then states, that Thomas Arnold received six shares in the Tennessee Land Company; and that he received 8,000 dollars on a policy of insurance on the brig Friendship; and that he received large consignments of property from Vincent Gray in Cuba in bills of exchange, &c. belonging to Jonathan's estate; and finally, that he received divers other large sums of money as agent of Jonathan. Now, it must be manifest, that upon allegations so general and indistinct no bill of review would lie. Here is no assertion of newly discovered evidence to maintain one. Such a bill, so framed, ought never to be allowed by a Court acting upon the correct principles of Chancery jurisdiction.

Afterwards, an amendment of this bill of review was filed, containing more distinct specifications of new matter, most of which, however, as I shall have occasion to notice hereafter, are open to the same objections as those already stated.

But the radical objection to both bills is, that they are improperly introduced into the cause at all. A bill of review can only be filed after it is allowed by the Court, and upon the very grounds allowed by the Court. The preliminary application by petition to file it should state the new matter shortly, distinctly, and exactly, so that the Court may see how it presses on the original cause; and it is not permissible to load it with charges and allegations, as in an original seeking bill in equity. In the sense of a Court of Chancery there is not before this Court any sufficient petition, upon which it can act.

But as the proceeding is a novelty in this Circuit, much indulgence ought to be allowed to the original counsel in the cause (for the present counsel is not at all chargeable) for irregularities of this nature, upon the first presentation of the practice. I advert to the posture of the cause, therefore, not so much with an intention to subject it to close criticism, as for the purpose of declaring, that, even if I could gather from the papers, that there is matter, upon which a bill of review would lie, it is not before the Court in such a shape, that the Court could judicially pass an order of allowance.

The case has, however, been argued, and with great ability, upon its merits; and waiving for the present any further refer-

ence to the form of the proceedings, I will proceed to the consideration of the points made at the bar.

The first point is one made by the defendant, and being preliminary in its nature, must be disposed of before the plaintiff can be further heard. It is said to be a rule in equity, that where a party has less decreed to him than he thinks himself entitled to, he cannot bring a bill of review; for that lies only in favor of a party against whom there is a decree. For this the opinion of elementary writers,[18] and the case of *Glover* v. *Partington* (2 Freeman R. 183; S. C. 2 Eq. Abrid. 174), is cited. The case, as here reported, certainly supports the doctrine. But it appears to me, that, if the doctrine is correct, it is so only in cases, where there is no error apparent on the face of the decree, and no newly discovered matter to support a bill of review, for then the proper remedy is by appeal. If there be no such remedy by appeal, but only by bill of review, it would be strange, if a material error could not be redressed upon such a bill by the party to whom it had been injurious; that if a man had 10,000 dollars due him, and had a decree for 100 dollars, he was conclusively bound by an error of the Court. The decision, reported in 2 Freem. R. 182, was made by the Master of the Rolls, who allowed the demurrer; but from the report of the same case in 1 Ch. Cas. 51, it appears, that it was afterwards re-heard before the Lord Chancellor and Baron Rainsford; and the demurrer was *overruled*.[19] So that the final decision was against the doctrine for which it is now cited. And Lord Nottingham, a few years afterwards, in *Vandebende* v. *Levingston* (3 Swanst. R. 625), resolved, that the plaintiff may have a bill of review to review a decree made for himself, if it be less beneficial to him than in truth it ought to have been. We may then dismiss this objection.

We may now advance to the examination of the points made by the petitioner in support of his petition for a review, assuming that the amended bill of review is to be received, *pro hoc vice*, as such a petition. I have already stated, that it is utterly defective in the essential ingredients of such a petition, in not stating with exactness the nature of the new evidence, and when it was first discovered. It is not sufficient to say, that the petitioner

[18] 2 Madd. Pr. 412; 1 Harris Pr. 86.
[19] See S. C. cited Com. Dig. Chancery; G. to the same effect.

expects to prove error in this or that respect: or that he has discovered evidence, which he hopes will establish this or that fact. But he must state the exact nature and form of the evidence itself, and when discovered. If written evidence, it must be stated, and its direct bearing shown. If of witnesses, what facts the witnesses will prove; and when the party first knew the nature of their testimony. It is impossible otherwise for the Court to judge, whether the evidence is decisive, or is merely presumptive or cumulative; whether it goes vitally to the case, and disproves it, or only lets in some new matter, confirmatory or explanatory of the transactions in the former decree. The party must go further, and establish, that he could not, by reasonable diligence before the decree, have procured the evidence. Now, in every one of these particulars, the amended bill, *quasi* a petition, is extremely deficient. I have looked it over carefully, and cannot find, that it points out a single written paper, which disproves the original case, or names a single witness, whose testimony, if admitted, would overturn it. It deals altogether in general allegations, that certain things are expected to be proved; and, like an original bill, proceeds to ask a discovery from the defendant of letters and papers in her possession as administrator, relative thereto. There are indeed, in the accompanying affidavits, some papers produced and relied on; but they cannot supply the defects of the original petition.

1. The first charge is in effect, that Thomas Arnold, as administrator of Jonathan Arnold, received certain property from Vincent Gray in Cuba, belonging to Jonathan's estate, which he has never inventoried or accounted for. The specifications under this head are, (1.) The receipt of 40 boxes of sugar, upon which charges were paid out of Jonathan's estate, amounting to $190: (2.) The remittance of a bill to Thomas Arnold, drawn by Andrew Davis on William Davis, Philadelphia, for $1222: (3.) The receipt by Captain Mathewson of $500. All these transactions took place in the year 1808, Jonathan having died in June, 1807.

Now, the original bill charged a partnership between Jonathan and Thomas, and asked for an account and settlement of the partnership concerns, as well as of the administration. After the answer it was referred to a master to take the accounts, and he made a report accordingly, after hearing the parties many times. In the hearing before the master, the accounts with Vin-

cent Gray were in controversy between the parties, and Thomas Arnold was interrogated as to the whole subject, and made his disclosures. So that the existence of an account with Gray, and the dispute, as to the receipts from him on account of Jonathan's estate, were matter of examination before the master. There is no pretence, that the residence of Gray was not well known; or that the plaintiff could not at that time, by reasonable diligence, have obtained his testimony, if he had desired it. He does not show, that he made any effort to obtain it; and if he had, the very papers now produced would have been obtained. What then is the posture of the case? The plaintiff goes on to a decree without seeking for evidence, though within his reach, and contents himself with such explanations as the defendant then gave; and now, after the lapse of several years, the defendant being dead, asks this Court to grant him a bill of review for errors in the account, which ordinary diligence would have rectified at that very time. If such a course should be allowed, it would furnish a perfect immunity for the grossest negligence. According to my understanding of the principles, upon which bills of review are granted, this Court, under such circumstances, is not at liberty to grant it. In *Bingham* v. *Dawson* (3 Jac. & Walk. 243), Lord Eldon refused to allow a bill of review under far less cogent circumstances, deeming it a most mischievous practice; and Mr. Chancellor Kent acted most deliberately to the same effect in *Livingston* v. *Hubbs* (3 Johns. Ch. R. 124).

But as to the matter of fact; Mr. Gray's letters show, that the 40 boxes of sugar belonged to Thomas Arnold, and not to Jonathan Arnold, thus establishing the incorrectness of this part of the petitioner's case, and leaving only the $190 in his favor. Then, as to the bill on Davis; Thomas Arnold, on his examination before the master, expressly stated, that it had never been paid, Davis being insolvent. And there is not a tittle of new evidence, now offered, to show that he did receive it. It is therefore a mere effort to rehear the original cause on this point. Then, as to the 500 dollars received by Mathewson. In the report 270 dollars is credited to Jonathan's estate on this account; and the only question is, whether the remaining 230 dollars ought to have been credited. Mr. Gray, in his letters (which, by the by, are mere statements now made, and not originals written at the time of the transactions, and are not sworn to by him), does not pretend to any absolute

certainty, as to the parties to whom the money belonged. He says in that of the 14th of April, 1826, that he had received of De la Motte $1,984, part of which he remitted to Thomas Arnold by the bill drawn on Davis. He did not then recollect how, or when, the balance was remitted. In his letter of the 14th of April, 1827, he states, that on examining his old accounts, &c., he finds, that he passed to the credit of the ship Tyre, Mathewson, master, for account of Thomas Arnold, in July 1808, $230, and in September of the same year, $270, in all 500 dollars; and he presumes, that this was the balance then collected. In his letter of the 27th of February, 1828, he adds, that the money, collected of De la Motte, belonged to Jonathan Arnold, and that the bill on Davis, the $500, the $190, and his commissions, made up the whole sum. Such is the explanation given by Mr. Gray, at the distance of 20 years after the original transactions; and it is too much to say, that his recollections, after such a length of time, ought to overturn the solemn proceedings before the master. It is, at best, testimony only of a presumptive character, cumulative in its nature, to a litigated fact, and, if admissible at all, as a ground for a review, is open to the suggestion of possible mistake. But it does so happen, that there is before the Court a letter of Mr. Gray to Thomas Arnold, written on the 12th of April, 1808 (and which, there is much to believe, was, among other papers from him, laid before the master upon the hearing), which may fairly lead to the belief, that Gray is now mistaken in supposing, that the money belonged exclusively to Jonathan Arnold. That letter begins by saying, "I have liquidated your accounts with Don Pablo de Motta, and taken the acceptance on the widow P. & H. for the balance due, &c., for 2088 dollars 3½." It then goes on to state, that Mr. Barker, of Charleston, has requested him to pay into his hands the money received from De la Motte, which he declined. It then adds, "On examination of the accounts, if any thing should appear to be due to Mr. Barker over and above the 1000 dollars heretofore received, I will remit it to him, or pay it into the hands of Mr. Bower. However, as you know better than I do, what sum ought to be paid to Mr. Barker, I wish you to settle the amount with him." If any thing is clear, from this language, it is, that Mr. Barker had, or was supposed to have, an interest in this very fund, and that Thomas Arnold was called upon to discharge it. And the first words in the letter, "your accounts," seem to indicate, that

Thomas Arnold also might have a personal interest in the fund. If Mr. Barker had an interest, what proof is there, that it did not amount to the 230 dollars, now sought to be credied in Jonathan's account? After this, what safe reliance can be placed upon Mr. Gray's recollection as to the $190 being paid out of the funds of Jonathan Arnold in his hands? It is certain, that, at that very time, he was collecting money for Thomas Arnold. The letter of instructions to Mathewson, in 1808, shows, that money was to be collected on the personal account of Thomas Arnold, as well as on account of Jonathan Arnold's estate. And Mr. Gray is certainly mistaken in supposing it was credited to the brig Tyre; for it was credited to the brig Perseverance. I do not mean to cast the slightest imputation upon this gentleman's credit. I do not doubt, that he relates the transactions, as he now supposes them to have been. But with the most perfect respect for his veracity, it is not too much to say, that, after such a length of time, no Court would be safe to grant a bill of review upon such proofs, at once inconclusive and unsatisfactory. It is to be remembered, that the case stands here very differently from what it would on an original bill. Here, the *onus probandi* is on the petitioner to establish the error, and it must be proved by newly discovered evidence or facts, to entitle him to a review. Great reliance has been placed, at the argument, upon *Moore* v. *Moore,* 2 Vez. 596, as a case of relief founded upon analogous principles. Without doubt, if a substantial error is conclusively ascertained by newly discovered evidence, that furnishes a ground for a review. But that case was not like the present. There John Moore was made a party to a bill for an account, as one of the executors of C. M.; and the plaintiffs insisted, that he acted as executor. That was not proved; and therefore he was not decreed to account as executor, and he refused to account. Afterwards it was discovered, that he had received £2500 mortgage money of the testator's estate. Lord Hardwicke thought this was proper matter for review; and that Moore ought to have disclosed the fact on his original answer, although he had not acted generally as executor. Now, there was nothing in this case to put the plaintiffs upon any inquiry as to any mortgage. They asked for an account generally of the testator's estate from his executors, in order to have a decree for their legacies. It would have been different, if the very mortgage had been in controversy between the parties, and brought out upon the account.

2. The next charge is, that in the account settled on the 31st of March, 1801, between Thomas Arnold and Jonathan Arnold, there was debited an item for one half of the premium on the schooner Fame, on her voyage home, of 180 dollars and 12 dollars interest, in all 192 dollars; which it is now said is erroneous, because no such insurance was made, or premium paid, the vessel and her cargo being then insured out and home, by the Providence Insurance Company, for more than the value of both. One of the charges, in the original bill, was of errors in the settlement of this very account; and upon the hearing, the Court decreed, that the account should stand, subject to any surcharge and falsification by the plaintiff. Of course, this item was open for contestation before the master. It was confirmed, as to this item, by the master; and if the Court now reviews it, it undertakes, after a lapse of 28 years and the death of both parties, to open a settled account upon a mere presumption of mistake, founded upon a very imperfect knowledge of the real circumstances. Thomas Arnold was liable to examination before the master for every item in his account. He might have been inquired of, as to the facts, where the insurance was made, and when the premium was paid; and as to all other material circumstances. The petitioner waived such inquiry in the very case, in which he was keenly on the scent to discover errors. It does not appear, that he made any inquiry, or was misled by any attempted misrepresentation or concealment on this head. If he then used no reasonable diligence in the matter, then before him, it must be a strong case to justify an interposition of the Court now in his favor.

But what is the newly discovered evidence to falsify the item? It now appears, that by a policy underwritten on the 24th of July, 1800, by the Providence Insurance Company; Thomas Arnold for Jonathan Arnold, Barker & Lord, and James Schmeibar, caused insurance to be made of 9000 dollars on the schooner Fame and cargo, viz. 7000 dollars on the cargo, and 2000 dollars on the vessel, from Charleston to Martinico, at and from thence to any one port in the United States, at a premium of 17 per cent.; with liberty to proceed from Martinico to any other port or ports in the West Indies, by adding *three per cent.* for every English windward port, and *five per cent.* for every other port. Upon the back of the office copy of the policy is the following indorsement. "October 26. Received information of her safe

arrival at Charleston; touched at Trinidad and St. Thomas; for which add 8 per cent. to the premium. Return 9 per cent. on $—— deficiency of cargo from St. Thomas." This indorsement was doubtless made by the proper officer of the Insurance Company; but what settlement was actually made does not appear by any competent evidence. It appears, however, from William Holroyd's papers, that Barker & Lord were charged in settlement by Thomas Arnold with one half of the premium of the *cargo* of the Fame, $986.48; and the other half of the premium on the same cargo, viz. $986.48, was charged to Jonathan Arnold, in the above account, settled in March, 1801. It is impossible, I think, from such facts alone, to ascertain, whether the charge of the 192 dollars for premium on the vessel *home* was correct or not; *non constat,* that there might not have been another policy, on which it was paid. The very terms of the charge suppose it to be a premium, not for the whole voyage, but for the return voyage only. Besides, it does not appear from this policy, or the other papers, that Barker & Lord had any interest in the vessel. The charge against them is for premium on *cargo* only; and if they had had any interest in the vessel, and the sum charged included both, it would probably have been mentioned. The very circumstance, that there is a distinct charge of the premium on the *vessel,* following that of the *cargo,* which is stated to be settled with William Holroyd, in the account of March, 1801, is strong presumptive proof, that Jonathan Arnold was the sole owner of the vessel. And this is quite compatible with the terms of the policy of insurance. And, after all, the conjecture of the counsel may be well founded, that the settlement under the policy, whatever it was, was by compromise. Who can say, after such a length of time, when the transactions are involved in so much obscurity, that he now understands them better than the parties did at the time, when they were fresh in their minds, and were settled in their accounts? There would be, as I think, much rashness in such an assertion. But, supposing there might be some doubt, is that a ground for unravelling an intricate, settled account, after such a lapse of time? Was there ever a bill of review maintained under such circumstances, especially, when a prior decree had given the party leave to surcharge and falsify? In short, can it be endured, that a bill of review should be allowed, but upon proofs, which, standing

alone, would overturn the decree, and would be conclusive on the point? Ought they not to be direct, plain, unequivocal?

The next item is a supposed error in the account settled in March, 1801, where Jonathan Arnold is charged with the payment of $2267.82, principal and interest on his note to Joseph Rogers. It is now said, that by newly discovered evidence the petitioner can show, that only $1693.95 was in fact paid on that account; and for the payment of this, Thomas Arnold had, in 1798, bills, the property of Jonathan, to the value of £800 sterling, which he had used and enjoyed the interest of. Many of the remarks already made apply with increased force to this item. In the first place, there is a settled acknowledgment between the parties, that the sum is right, and the note was paid. In the next place, as to the bills of exchange. They are duly credited and admitted in the same account, as correctly applied. How then can we say, that they were used differently from what the parties intended? There is no new evidence, as to these bills; and they were included in the report of the master. But what is the new evidence now suggested as to the item of $2267.82? It is simply this. Mr. William Holroyd was agent of some sort for Rogers (we do not know how far), and in his books (for he is dead) there are now found two credits to Joseph Rogers, one, under date of October 5, 1799, of $600, "received from Thomas Arnold in part of Jonathan Arnold's note;" the other under date of November 9, of the same year, of "amount of Thomas Arnold's note, $1100, deduct discount, $6.05, viz. $1093.95," making together the amount of $1693.95. No other credits appear on Holroyd's books. Rogers is also dead, and in his books no other credits can be found in his accounts with Holroyd; and what is curious enough, the credit of $600 is stated to be "cash in part of T. Arnold's note," and not of Jonathan's. And in Rogers's cash account even the whole of these sums is not credited. What then is the plain amount of this evidence? not, that Thomas Arnold never paid the sum of $2267.82 on Jonathan's note; but that the payments cannot be distinctly traced, at this distance of time, in either Holroyd's or Rogers's books. And suppose they cannot. Is a settled account to be opened, because third persons, to whom payments have been made, omit to keep correct books, or enter full credits? Is their omission to prejudice the rights of others; and to overturn the deliberate

settlements of parties? Are we to indulge in presumptions, that the parties did not know their own concerns, and that there has been fraud or mistake, because we cannot now trace back the origin of payments acknowledged by them? What proof have we, that the sums stated in these books were payments on account of the very note charged in the settlement? The payment of $1093.95 purports to be on Thomas's note; how can we say, that it was on Jonathan's? The Court is, then, called upon to re-examine this account upon mere surmises and conjectures; and the petitioner now demands, that the original note of Jonathan should be proved to verify the payment, exactly as if this were an original bill for an account, and a discovery. The original bill sought to set aside the settled accounts; leave was given to surcharge and falsify; and after a decree confirming the account, a discovery is sought upon new evidence of the loosest texture, and most inconclusive nature. The evidence, such as it is, was open to the plaintiff at the original hearing, if he had chosen to look for it, and by reasonable diligence it might then have been obtained, as well as now. If it had been obtained, I think it would have come to nothing. But as a foundation of a bill of review it is wholly inadmissible. I observe too, that the master states, that this very item was in controversy before him; and that Holroyd's books were examined for the purpose of explaining one or more payments to Rogers by Thomas Arnold on Jonathan's account.

The next item is, that there was an insurance at Malaga, of $8000, on the brig Friendship's cargo, from that port to the Mediterranean and home; that she was captured in 1797 on the voyage home; and that one half of this cargo belonged to Jonathan, and therefore half of the insurance ought to be credited to him. Now, this very item was not only in controversy before the master (as he states), but it was made the subject of a special interrogatory in the original bill, and a discovery prayed. Thomas Arnold, in his answer, expressly stated, that he had no knowledge of any insurance at Malaga; but had been informed, that there had been a policy there procured by Captain Proud (the master), on the cargo from Malaga to Genoa only; and as that risk terminated without loss, and the vessel was captured afterwards on her voyage home, he never received anything on that insurance. Here, then, the petitioner was bound to use reasonable diligence, if he did not choose to rely upon the state-

ment in the defendant's answer, and subsequent examination before the master. But he never sent to Malaga; and never made any search for Captain Proud or his papers. Captain Proud is now dead. There is not now the slightest proof, that any money ever was received from the insurance in Malaga. The petitioner now calls upon the other party for a discovery, exactly as he did in the original bill; not because any new fact has come to his knowledge since the decree; but because he has now discovered an old letter, unsigned and unfinished, in the handwriting of Captain Proud (which does not appear ever to have been sent to the owners), in which a suggestion is found about insurance made, or to be made by him, on cocoa (part of the cargo), up the Straits, and advising the owners to procure insurance on the *vessel* from Malaga home. The letter is exceedingly obscure in its terms, and it is utterly impossible to ascertain what were the precise terms or nature of the insurance; though I should conjecture from its language, that it was limited to the *cargo* from Malaga to Genoa. If so, it stands completely in harmony with the original answer, and supports it. But if it were otherwise; what ground is here laid for a review? The paper, if newly discovered, is not evidence; and it establishes no receipt of any money by Thomas Arnold on the insurance, which is the material fact. A bill of review is not a bill for a discovery; but a bill founded upon a discovery already made of evidence material and decisive to the issue.

The next charge is, that in the master's report an allowance is made for a note of Jonathan Arnold to Minturn & Champlin, indorsed by Thomas Arnold, and by him paid to Joseph Jenkins, viz. $824.12½; whereas Minturn & Champlin had received 32 bags of pimento belonging to Jonathan, and had sold the same for $253, and applied the proceeds towards the discharge of the same note. It is sufficient to say, that there is no proof to this effect; nor any newly discovered evidence offered to support the statement. No reason is pretended, why Minturn & Champlin's accounts were not investigated at the original hearing.

The next charge is, as to the Tennessee Land Company shares, owned by Jonathan Arnold, the proceeds of which had been received by Thomas Arnold. The whole number owned by Jonathan was fifteen; Thomas accounted before the master for nine shares, as all received by him. The petitioner had the most ample means, by a search in the proper public office at Washington, to have

ascertained the whole amount received by Thomas on the shares, if he had used any diligence. The case, therefore, falls precisely within the doctrine of Lord Eldon in *Bingham* v. *Dawson* (3 Jac. & Walk. 243). But the receipt, now produced from the public records at Washington, signed by Samuel Dexter, satisfactorily establishes, that Jonathan had long before sold the six shares, now in controversy, to Dexter. And that was the very explanation asserted before the master by Thomas Arnold. There is not a shadow of proof, that he ever received on these shares any money, which he has not accounted for.

I pass over the next charge, which respects the £100 note, included in the mortgage on the Paget farm. It was disposed of upon an exception of the plaintiff in the former decree, which is reported in 3 Mason R. 284, 286. No new evidence on this point is pretended.

The next item is for an allowance made out of Jonathan's estate in the master's report of the sum of $4800 and upwards, due from Jonathan's estate to the estate of Welcome Arnold, and secured by a mortgage given by Jonathan to Thomas Arnold, as administrator of Welcome, and which was allowed him upon his agreeing to cancel the mortgage, which he has not done, but refused ever afterwards to do. The mortgage appears to have been given to Samuel G. Arnold, as attorney of Thomas Arnold and Patience Arnold, administrators of Welcome Arnold. I agree, that it was the duty of Thomas Arnold to procure a cancellation of that mortgage after the credit was allowed, whether he made an express promise to do so, or not. If he had a right of retainer, as administrator on both estates, he had a right to the credit allowed in settling the account. It was not matter of exception, at that time, that it was done; and it furnishes no ground of review now. The proper remedy is by an original bill to compel satisfaction to be entered on the mortgage, and a re-delivery or cancellation of it. To such a bill the administratrix of Thomas Arnold might be properly made a party, at least for the purpose of compelling an application, or re-payment of the sum credited, if the mortgage deed is not cancelled, and the credit has not been already made to Welcome's estate. If such a suit should be unproductive, I do not mean to say, that there might not be circumstances, upon which this Court might give leave for a bill of review, in order, that the credit might be struck out, if Jonathan's

estate was to sustain a real injury, as if possession under the mortgage was insisted upon, and held at law under the mortgage. At present I do no more than say, that the matter now presented furnishes no such ground.

I have thus gone over all the principal grounds for the bill of review, supposing them to be before the Court with all due distinctness and particularity, and in a shape regular and tangible. If I had more leisure I might comment, somewhat more at large, upon the principles applicable to this subject. But it being my deliberate judgment, that the case is not a fit one for a review, I content myself with ordering, that the petition be dismissed with costs.

The District Judge concurs in this opinion, and therefore let the petition be accordingly dismissed.

Hill v. *Phelps, 101 Fed. Rep. 650. (1900.)*

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

This is an appeal from an order which dismissed a bill of review upon demurrer. The bill was filed on April 20, 1898, and sought a modification of a decree of the court below rendered on December 22, 1897. The material facts it set forth were these: On July 3, 1894, J. M. Phelps and A. C. Phelps made their promissory note for $5,927.70 on account of a debt which they owed to the appellants. Afterwards A. C. Phelps made his individual note for this indebtedness, and induced the appellants, by false representations, to accept that note in lieu of the joint note. On June 3, 1896, the appellants obtained a judgment against A. C. Phelps upon this note for $6,881.25, and caused an execution to be issued thereon, which was returned *nulla bona*. Meanwhile A. C. Phelps, for the purpose of defrauding the appellants out of their debt, made to the appellee Adolph Sloan, as trustee, a deed of trust of his lands to secure an alleged indebtedness of $10,279.38 to the appellee the Lawrence County Bank, and alleged debts of $1,000 to each of the appellees F. G. Williams, Mary A. Lester, and J. M. Cook; and the bank, for the purpose of defrauding the appellants, of preventing them from collecting their debt, and of covering up the land, extended the time of payment of its claim of $10,279.38 for five years. Thereupon the appellants brought suit in the court

below to reinstate the joint note of A. C. Phelps and J. M. Phelps in place of the separate note of A. C. Phelps, and to set aside the trust deed; and on December 22, 1897, a decree was rendered in that suit to the effect that the joint note should be substituted for the separate note, and that J. M. Phelps should pay it. The evidence in that suit indicated that the deed of trust to secure the Lawrence County Bank was made to hinder and delay the collection of the appellants' debt, but the court declared that as J. M. Phelps was amply solvent, and the decree against him would be sufficient to enable the appellants to recover the debt, it would not carry the adjudication further than was necessary to attain the ends of justice, and for this reason it denied any further relief. The appellants prayed an appeal from this decree, but the appellees paid off the decree, so that they could not prosecute their appeal to a hearing. At the time of the execution of the trust deed, A. C. Phelps owed another debt to the appellants, upon which they recovered judgment on December 26, 1896, for $58,-641.41. On June 18, 1897, $40,708.60 was paid on this judgment, and the balance has not been paid. The appellants allege that they could not include this latter judgment in their suit without making their bill multifarious, and that the decree refusing to set aside the deed of trust in that suit is a conclusive adjudication against them, and bars a new suit for that purpose upon their second judgment; and for this reason they pray that the decree of December 22, 1897, be so modified as to adjudge the trust deed to Adolph Sloan to have been fraudulent in so far as it undertook to secure the payment of the debt to the Lawrence County Bank; that the land described in that deed be sold, and the proceeds thereof, so far as the interest of the bank is concerned, be applied to the payment of the second debt to the appellants, or, if this relief cannot be granted, that the decree be so modified as to dismiss the suit in which it was rendered, without prejudice to the rights of the appellants to proceed against the bank and Sloan.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The purpose of a bill of review is to obtain a reversal or modification of a final decree. There are but three grounds upon which such a bill can be sustained. They are (1) error of law apparent on the face of the decree and the pleadings and proceedings upon which it is based, exclusive of the evidence; (2) new matter which

has arisen since the decree; and (3) newly-discovered evidence, which could not have been found and produced, by the use of reasonable diligence, before the decree was rendered. No departure has ever been made from the rules applicable to such a bill, which were declared by Lord Chancellor Bacon, in the first of his ordinances in chancery, in these words:

"No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review. And no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter, which hath arisen in time after the decree, and not any new proof, which might have been used, when the decree was made. Nevertheless, upon new proof, that is come to life after the decree was made, which could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise."

Beames, Orders Ch. 1; Story, Eq. Pl. § 404; 2 Daniel, Pl. & Prac. p. *1575; *Kennedy* v. *Bank,* 49 U. S. 586, 609, 12 L. Ed. 1209.

The error in law which will maintain a bill of review must consist of the violation of some statutory enactment, or of some recognized or established principle or rule of law or equity, or of the settled practice of the court. Error in matter of form or in the propriety of a decree, which is not contrary to any statute, rule of law, or to the settled practice of the court, is not sufficient to maintain a suit to review a final decree. *Freeman* v. *Clay,* 2 U. S. App. 254, 267, 2 C. C. A. 587, 593, 52 Fed. 1, 7; *Hoffman* v. *Pearson,* 8 U. S. App. 19, 38, 1 C C. A. 535, 541, 50 Fed. 484, 490. Resort cannot be had to the evidence to discover this error of law. It must be apparent from the pleadings, proceedings, and decree, without a reference to the evidence, or it will not avail to sustain a bill of review. *Whiting* v. *Bank,* 13 Pet. 5, 14, 10 L. Ed. 33; *Kennedy* v. *Bank,* 49 U. S. 586, 609, 12 L. Ed. 1209; *Putnam* v. *Day,* 22 Wall. 60, 66, 22 L. Ed. 764; *Buffington* v. *Harvey,* 95 U. S. 99, 24 L. Ed. 381. The new matter which will authorize a review of a final decree must have arisen after its rendition. The newly-discovered evidence which may form the basis of such a review must be, not only evidence which was not known, but also such as could not, with reasonable diligence, have been found before the decree was made. *City of Omaha* v. *Redick,* 27 U. S.

App. 204, 211, 11 C. C. A. 1, 6, 63 Fed. 1, 6; *Dias* v. *Merle,* 4 Paige, 259, 261; *Henry* v. *Insurance Co.* (C. C.) 45 Fed. 299, 303; Story, Eq. Pl. §§ 338a, 423; 1 Barb. Ch. Prac. 363, 364; 1 Hoff. Ch. Prac. 398; Fost. Fed. Prac. § 188, note 19.

The sole purpose of the original suit in equity in this case was to enforce the collection of the claim of the appellants for the $6,881.25 evidenced by their judgment of June 3, 1896. In order to accomplish this purpose, they asked that the court would reinstate the joint indebtedness of J. M. Phelps and A. C. Phelps in the place of the separate debt of A. C. Phelps, upon which that judgment was rendered, and that it would set aside the trust deed of the lands of Phelps to Sloan, which was made to secure the indebtedness of the Lawrence County Bank. The court granted all the relief necessary to effect the object of the suit. It substituted the joint debt for the separate debt, and adjudged that J. M. Phelps should pay it. He did so, and the entire purpose of that litigation had been served. The court refused to avoid the trust deed, because J. M. Phelps was solvent, and because the relief which it granted was ample, without more, to enforce the collection of the only claim which appeared in that suit. The bill of review seeks a modification of this decree on the sole ground that the failure of the court to grant this unnecessary relief may estop the appellants from avoiding this trust deed, and thereby enforcing the collection of their second claim, evidenced by their judgment of December 26, 1896, which was in existence during the entire pendency of their suit in equity upon their first claim, but which was neither pleaded, proved, nor presented to the court in any way in that suit. There may be some doubt whether or not the decree, as it stands, has the effect to estop the appellants from avoiding the trust deed, for fraud, in a suit brought upon their second claim. While such a suit will be between the same parties and those in privity with the same parties named in the first suit, it will be upon a different cause of action, and the decree in the first suit will operate as an estoppel only upon the points and questions which were actually litigated and determined in it. Whether or not the fraudulent character of the trust deed, as against the second claim of the appellants, was actually raised, litigated, and determined in their suit in equity upon their first claim, may be the subject of pleading and proof. *Board* v. *Sutliff,* 38 C. C. A. 167, 97 Fed. 270, 274; *Cromwell* v. *Sac Co.,* 94 U. S. 351, 352, 24 L. Ed. 195; *Nesbit* v. *District,* 144 U. S. 610, 618,

12 Sup. Ct. 746, 36 L. Ed. 562; *Board* v. *Platt,* 49 U. S. App. 216, 223, 25 C. C. A. 87, 91, 79 Fed. 567, 571.

Conceding, however, but not deciding, that the decree in the suit upon the first claim renders the question whether or not the trust deed should be avoided for fraud *res adjudicata* in a subsequent suit for that purpose on the second claim, no ground for review or modification of the decree is presented by the allegations of the bill before us. There was no error in law in that decree. It followed the pleadings, and determined all the issues which they presented. Whether or not it was warranted by the evidence, and whether or not the evidence authorized other or further relief, are questions that are not open for consideration here, because the error that will sustain a bill of review must be apparent upon the pleadings, the proceedings, and the decree, without reference to the evidence. There was no error in the failure of the court to grant more relief than the substitution of the joint debt for the separate debt, because it granted ample relief to accomplish the purpose of the suit, and because, in the absence of the evidence, which we cannot consider, it does not appear that the proofs would have sustained any other relief. One cannot successfully assail the decree of a court of chancery, which has procured him all the resulting benefit he sought, because the court did not make further adjudications and grant other relief, which were not necessary to the accomplishment of the purpose which he disclosed to the court. It is not error for a court of chancery, which grants sufficient relief to enable a complainant to reap all the fruits which he seeks by his litigation, to refuse to exercise all its powers and make other and unnecessary adjudications. The court granted relief which enforced the collection of the only claim which the complainants presented to it. They have received payment of that claim. They suffered nothing in that suit from the failure of the court to avoid the trust deed, because they could have obtained nothing more if it had done so. Courts of equity do not attempt to right wrongs at the suit of those who have suffered nothing from them, or to grant decrees that can give their suitors no relief. *Darragh* v. *Manufacturing Co.,* 49 U. S. App. 1, 16, 23 C. C. A. 609, 618, 78 Fed. 7, 16. No error appears in the pleadings, proceedings, or decree on account of the fact that the latter may have the effect to estop the appellants from collecting their second claim, by avoiding the trust deed for fraud, because that claim was not pleaded, proved,

or presented in the suit upon which the decree is based, and its existence was unknown to the court when it rendered its decree. As the question of the effect of its decree upon this second claim was not presented to, considered or decided by, the court below when it entered its decree, it could not have erred upon that question. The bill of review discloses no error in law in the decree which it assails. Nor does the bill disclose any new matter or any newly-discovered evidence which will warrant the relief it seeks. The sole ground for that relief is that the decree of December 22, 1897, estops the appellants from enforcing the collection of their judgment of December 26, 1896, by an avoidance of the trust deed for fraud. But the debt upon which that judgment is founded existed during the entire pendency of the suit in equity upon the first claim of the appellants, and all the facts which condition the effect of the decree in that suit upon their second claim were as well known to the appellants at the time that decree was rendered as they ever have been since. Mr. Justice Story, at section 423 of his Equity Pleadings, says:

"If, therefore, the party proceeds to a decree after the discovery of the facts upon which the new claim is founded, he will not be permitted afterwards to file a supplemental bill in the nature of a bill of review, founded on those facts; for it was his own *laches* not to have brought them forward at an earlier stage of the cause."

The decree cannot be modified on account of new matter or newly-discovered evidence, because the matter set forth in the bill existed, and the evidence it pleads was known, before the decree was rendered.

There is another reason why the decree in this case cannot be reviewed. It is that the appellees have paid, and the appellants have accepted, the entire debt which the decree was rendered to enforce. One who accepts the benefits of a verdict, decree, or judgment is thereby estopped from reviewing it, or from escaping from its burdens. *Albright* v. *Oyster,* 19 U. S. App. 651, 9 C. C. A. 173, 60 Fed. 644; *Chase* v. *Driver,* 92 Fed. 780, 786, 34 C. C. A. 668, 674; *Brigham City* v. *Toltec Ranch Co.* (C. C. A.) 101 Fed. 85. The decree below is affirmed.

NE EXEAT.

Dunham v. *Jackson, 1 Paige Ch. (N. Y.) 629. (1829.)*

IN this cause the bill of the complainant had been dismissed with costs; and the complainant had suspended the proceedings to collect the costs by an appeal to the Court of Error.

THE CHANCELLOR:

The object of the writ of *ne exeat* is to obtain equitable bail, and may be applied for in any stage of the suit. The complainant intends to leave the state before the appeal can be determined. The defendant is not obliged to follow her to Florida to obtain satisfaction of the costs decreed. In *Stewart* v. *Stewart* (1 Ball & Beatty, 73), a *ne exeat* was granted against a complainant who was about to leave the country before the decree for costs could be made effectual against him.

The *ne exeat* must be granted in this case unless the complainant gives security to abide the final decree.

Denton v. *Denton, 1 Johns. Ch. 364. (1815.)*

THE petition of the plaintiff stated, that, in January last, she filed her bill against the defendant, setting forth that she was married to the defendant on the 25th of October, 1795, in this state, and that they were then, and still are, citizens and residents of this state. That on the 20th of April, 1814, the defendant broke up housekeeping, though for years before, his annual expenses for housekeeping were between 4 and 5,000 dollars. That the defendant abandoned the plaintiff without home or support, and had since treated her with great cruelty and persecution, and denied her all support: that she had no means of living: that the defendant was a man of large fortune, and threatened to leave the United States. And she prayed a writ of *ne exeat,* and a writ of *supplicavit,* to restrain the defendant from disturbing her retreat, and for security, and for money to prosecute the suit, and also for a weekly or monthly allowance. The bill for a divorce was filed, but no answer was yet put in.

The facts stated in the petition were supported by affidavits,

from which it also appeared that the defendant was a man of fortune, and worth above 200,000 dollars.

THE CHANCELLOR:

The bill filed in this cause states matter properly cognizable in equity. It is as well for alimony as for other relief. The allowance of a *ne exeat,* when the husband threatens to leave the state, and his wife without any support, is essential to justice, and has been granted in like cases. (2 Atk. 210. Amb. 76. Dickens, 154.) From what was said in the case of *Mix* v. *Mix,* as well as from the cases now cited, the rule appears to be, that the wife who is under the necessity of carrying on a suit against her husband, or of defending one against him, is entitled, as well to a reasonable allowance to be paid by the husband for the necessary expenses of the suit, as to an allowance for alimony pending the prosecution.

I shall, accordingly, allow the *ne exeat,* and direct security under it to be taken, in the sum of 25,000 dollars, and shall, also, allow at the rate of 100 dollars per month, for alimony, and the further sum of 250 dollars, to be paid by the defendant to the plaintiff, or to the register, or assistant register, on her behalf, towards defraying the necessary charges of the suit, on her part.

Porter v. *Spencer, 2 Johns. Ch. (N. Y.) 169. (1816.)*

THE bill, which was for an account and a *ne exeat,* stated that the plaintiffs were merchant tailors, and had sold clothing to the defendant on a credit of six months; that on the 1st of January last, there was a balance of account due to them from the defendant, with interest, of 317 dollars and 85 cents. To recover this sum, the plaintiffs had brought an action at law against the defendant, and held him to bail; and the defendant had pleaded the general issue, merely for delay. That the defendant's father was a special bail, and had, as the plaintiffs were informed, and verily believed, sold all his property in this state, and was about to remove permanently from the state. That the defendant was also about to remove immediately with his father, without leaving any property behind.

The bill was sworn to, and was accompanied also with an affidavit, as to the truth of the material facts charged.

THE CHANCELLOR:

The general language of the cases prior to the time of Lord Eldon is, that the writ of *ne exeat* is not to be granted, if the demand be not purely and exclusively equitable. (*King* v. *Smith,* Dickens, 82. *Brocker* v. *Hamilton,* Dickens, 154. *Pearne* v. *Lisle,* Amb. 75. Anon. 2 Atk. 210. *Crosley* v. *Marriot,* Dickens, 609.) If the demand be actionable at law, and the party can be arrested and held to bail, there is no necessity for the writ; and if the case be not bailable, the granting of the writ would be holding the party to bail, when the plaintiff was not entitled to bail at law. The *ne exeat* has accordingly been refused, when the demand was in prosecution at law, *and not bailable,* though the defendant was about to remove with his effects. (*Crosley* v. *Marriot,* Dick. 609. *Case of Gardner,* 15 Vesey, 444.)

But where a defendant, after a verdict at law, and before judgment, was threatening to go beyond sea, the *ne exeat* was allowed in an early case (*ex parte Brunker,* 3 P. Wms. 312), by the master of the rolls, though Lord Talbot afterwards discharged the writ, and on the ground, principally, that no bill was filed. He added, also, "that the writ ought not to be made use of where the demand is entirely at law, *for there the plaintiff has bail, and he ought not to have double bail, both at law and in equity.*"

The import of this case is, that the rule against the allowance of the writ, where the matter was of legal cognizance, was not then understood to be inflexible, but would be made to yield to cases of necessity, when justice would be defeated without the aid of the writ. In *Atkinson* v. *Leonard* (3 Bro. 218), Lord Thurlow laid down the rule, that if chancery had concurrent jurisdiction, as in the case of a lost bond, it was sufficient to authorize the writ, if the demand was an equitable one; and he granted it as a measure to compel the party to give security to abide the decree; and Lord Loughborough only doubted, in *Russel* v. *Asby* (5 Vesey, 96), whether the *ne exeat* would lie when the defendant might be held to bail at law.

Since the time of Lord Eldon, however, it has become settled in the English chancery, that though the plaintiff may sue at law for the balance of an account, and hold the party to bail, yet, as chancery holds a concurrent jurisdiction upon the head of account, the plaintiff may have the *ne exeat,* on a positive affidavit of a threat or purpose of going abroad, even though the defend-

ant's general residence was abroad. (*Jones* v. *Alephsin,* 16 Vesey, 470. 11 Vesey, 54. and 1 Ves. & Beame, 132, 133. *Howden* v. *Rogers*). In *Amsinck* v. *Barklay* (8 Vesey, 594), the defendant was arrested at law, and surrendered into custody; he was then held to bail on *ne exeat* for the same sum, and afterwards discharged in the suit at law for want of proceeding. The *ne exeat* was discharged on the ground that the defendant had first been arrested at law and kept in custody, and then discharged; and in *Jones* v. *Sampson* (8 Vesey, 593), the chancellor admitted his authority to grant the writ where the jurisdictions were concurrent; but he observed (p. 598), that if the plaintiff was actually arrested at law, he would not grant the writ.

In the present case, I have some doubts, whether the bill states a matter of account on which the jurisdiction of the Court can attach. To sustain a bill for an account, there must be *mutual demands,* and not merely payments by way of set-off. A single matter cannot be the subject of an account. There must be a series of transactions on one side, and of payments on the other. (*Dinwiddie* v. *Bailey,* 6 Vesey, 136. and *Wells* v. *Cooper,* there cited). I place my interference on the necessity of the case. From the facts charged and sworn to, it appears to me that the remedy in the suit pending at law would be absolutely defeated without the interposition of this Court. The books assume and admit principles that will justify the allowance of the writ under the peculiar circumstances of the present case. The remedy sought is indispensable to prevent a failure of justice, and this creates a marked difference between this and the ordinary cases. I should think it would reflect discredit on the administration of justice, if the plaintiff could find no relief from the impending mischief arising from a failure of the remedy at law, by the immediate removal of the defendant and his bail. I have no option or discretion to refuse the writ, when a case is brought within the established rules of the Court.

This is not holding a party to bail when he is not entitled to it. Nor is there double bail, for the first bail is going abroad with all his effects, and that too in connection with the defendant; and though I am not free from diffidence, as to the view I have taken of this case, I feel myself bound to declare, from the best judgment I can form at present, that a *ne exeat* ought to be granted.

Writ of *ne exeat* granted in the sum of 500 dollars.

PRODUCTION OF PAPERS.

Kelly v. *Eckford, 5 Paige Ch. (N. Y.) 548. (1836.)*

THIS was an appeal, by the complainants, from an interlocutory order of the vice chancellor of the first circuit, directing them to deposit certain partnership books and papers with a master, for the inspection of the defendants, before answer. The bill was filed by the complainants, as the assignees of J. Beacham, for an account and settlement of a partnership transaction between Beacham and H. Eckford, the defendants' testator. The petition, upon which the order of the vice chancellor was founded, stated that an inspection of the partnership books and papers, in the hands or under the control of the complainants, was necessary to enable the defendants to answer the bill, and to make their defence with a due regard to the interests of the estate of the decedent.

THE CHANCELLOR:

In ordinary cases the defendant is not entitled, by motion, to call upon the complainant for the production of his books, or other documentary evidence in his possession, before answer, to enable such defendant to make his defence. The case of *The Princess of Wales* v. *The Earl of Liverpool* (1 Swans. Rep. 114, 2 Wils. Ch. Rep. 29, S. C.), in which such an order was made by Lord Eldon, and where he subsequently dismissed the bill because the note stated in such bill was not produced, has always been considered as a political decision. The decision of *Jones* v. *Lewis* (2 Sim. & Stu. 242), by Sir John Leach, the only case in which it has been followed in England, was afterwards reversed by Lord Eldon himself. (See 4 Sim. Rep. 324.) And in the recent case of *Penfold* v. *Nunn* (5 Sim. Rep. 409), where the defendant asked for the production of documents in the hands of the complainants, to enable him to answer the bill, Sir Launcelot Shadwell said he never understood the reason upon which the decision in *The Princess of Wales* v. *Lord Liverpool* proceeded, and that he could not accede to it; that if the defendant wanted to prove, in the action which he had brought, the consideration given for the bill of

exchange which he then sought to have delivered up, he ought to have filed a bill against the plaintiff, for a discovery of the documents which he then asked to have produced; that the defendant was at liberty to call upon the plaintiff to produce the documents, and if the latter refused to do so, he could not afterwards complain that the answer was insufficient; and that if the defendant required them for the purposes of his defence in the suit, he ought to file a cross bill against the plaintiff for a discovery of them. A similar decision was made by this court, a few days since, in the case of *Corning* v. *Heartt.* (In Chanc. Dec. 24, 1835. See also *Lupton* v. *Pearsall,* 2 John. Ch. Rep. 429; *Denning* v. *Smith,* 3 Idem, 409; *Spragg* v. *Corner,* 2 Cox's Cas. 109; *Hare* v. *Collins,* Hogan's Rep. 193.)

This principle of requiring the defendant to file a cross bill of discovery only applies, however, to those cases in which the defendant wants the inspection of the complainant's documentary evidence to enable him to put in his answer, or to make out his defence to the suit. But it is not applicable to the case of partnership books and papers in the hands of one of the partners, or his assignees or representatives, where both parties have an equal right to the examination and inspection thereof for the purposes of the suit. In such cases it is the constant and uniform practice of this court, upon the application of either party, and in any stage of the suit, to order the adverse party to deposit any of the partnership books and papers, which belong equally to both, in the hands of an officer of the court, for the examination and inspection of the adverse party; and to permit copies thereof to be taken by the several partners, or their representatives. It was to a case of this kind that Lord Eldon referred, in the case of *Pickering* v. *Rigby* (18 Ves. 484), and in *Micklethwait* v. *Moore,* (3 Meriv. 296), although he does not appear to have expressed his meaning very clearly in either case, or to have explained the true principles upon which the production is refused in the case of the plaintiff's own papers, while it is granted as to the partnership books and papers to which both parties have an equal right. In a court of law it is a matter of course to compel one party, who has the possession of a document which belongs equally to both, to produce the same for the inspection of his adversary, for the purposes of the suit. (See *Reid* v. *Coleman,* 2 Cromp. & Meeson, 456; 4 Tyrwh. 274, S. C.)

There was no evidence before the vice chancellor that the defendants had any books or papers, belonging to the partnership, in their possession. The order appealed from was therefore right; and it must be affirmed with costs. If the defendants have in their custody or power any of the partnership books or papers, the plaintiffs will be entitled to an inspection thereof, upon an affidavit that such an inspection is necessary for the purposes of the suit, on making a proper application to the vice chancellor for such an order.

ABATEMENT AND REVIVOR.

Leggett v. *Dubois, 2 Paige Ch. (N. Y.) 211. (1830.)*

THE bill in this cause was filed to compel the specific performance of an agreement made by the Rev. J. Sellon, now deceased, with the complainant, relative to the sale or exchange of a small piece of land between Beekman and Ann streets in the city of New-York; of which land it was alleged that Sellon was the real owner, or the *cestui que trust,* and that H. Walton was his trustee. It was further alleged in the complainant's bill that the land in question was conveyed to the other defendants, or some of them, after notice of the complainant's rights, and while it was held adversely by him. An answer having been put in by a part of the defendants, the cause was at issue as to them. The answer of Sellon was adjudged insufficient; and he was in contempt for not answering at the time of his death in March last.

THE CHANCELLOR:

The cases intended to be embraced by the 107th section of the title of the revised statutes which relates particularly to this court (2 R. S. 184), are those where the right of the deceased party vests in some or one of the survivors; so that a perfect decree may be made as to every part of the subject of litigation, without any alteration of the proceedings, or bringing any new parties before the court. Such is the case of a suit brought by or against two or more executors, trustees or joint tenants; where, on the death of one, the whole right of action or ground of relief survives in favor of or against the other. In such cases, there is in fact

no abatement as to the survivors; and upon a proper application by either party on affidavit, showing the fact of the death, and that the cause of action has survived, the court will order the suit to proceed. The 108th section provides for another class of cases, where some of the parties survive and the rights of the parties dying do not survive to them, but some other person becomes vested with the rights and interests, or is subject to the liabilities of those who are dead. In such cases, the complainants may proceed without making those persons parties, provided a decree can be made between the surviving parties without bringing such persons before the court. The decree, in that case, will not effect those in whom the rights of the deceased parties have become vested. Under a similar provision in the former statutes of this state, Chancellor Sanford decided that it was optional with the surviving complainant to revive the suit or to proceed without reviving; but that he was not bound to do either; that he might elect to abandon the suit. (1 Hopk. R. 450.) The revised statutes have provided for such cases; and the surviving defendants may now revive the suit if the complainants, or those who are entitled to revive in the first place, neglect to do so within such time as may be allowed by the court for that purpose. The proceedings to obtain a revival of the suit, under these provisions of the revised statutes, must be by petition; and an order for that purpose cannot be granted on motion founded on affidavit only. The petition is the substitute for a bill of revivor. But a formal bill may perhaps be necessary where the representatives of the deceased party cannot be found, or where they are infants. (7 John. R. 613, per Van Ness, J.) It is undoubtedly the duty of the complainant to revive, if he wishes to proceed with the suit, and to have the benefit of the previous proceedings. And where a suit abates by the death of either of the parties pending an injunction, the defendant or his representatives may have an order that the complainant or his representatives revive the suit, within a reasonable time, or that the injunction be dissolved. (1 Hen. & Munf. 203. 1 Cox's Ca. 411. 2 id. 50.)

In this case, there has not as yet been any unreasonable delay on the part of the complainant; but he must, within sixty days, proceed to revive the suit against the legal representatives of Sellon, or consent to proceed against the surviving defendants only, or the injunction must be dissolved.

CHAPTER X.

CROSS BILL, INTERPLEADER, PERPETUATE TESTIMONY, ETC.

Cross Bill.

Lowenstein v. *Glidewell, 5 Dillon, 325. (1878.)*

Subpoena to Answer Cross-Bill.—Service on Solicitor.—Bill and Cross-Bill.—Right of Voluntary Dismissal.

The plaintiffs filed their bill to foreclose a deed of trust on real estate. R. D. Partee and wife, among others, were made defendants, upon the allegation that they had some interest in the said mortgaged premises, or some part thereof, as purchasers, judgment creditors, or otherwise, which interests, if any, have accrued subsequent and are junior to complainants' lien, and subject thereto. Partee and wife answered, alleging they were the owners in fee of the property by purchase from one Christman, from whom Parish, the grantor in the deed of trust, derived his title; that the sale of the premises by Christman to Partee and wife was made long before the conveyance by Christman to Parish, and Parish to plaintiffs; that all these parties had full notice of the purchase by Partee and wife; that a suit for specific performance of the contract for the sale of the property was brought by Partee and wife against Christman in the Pulaski chancery court, and was pending at and before the conveyance of the property by Christman to Parish, and Parish to plaintiffs, and that said parties had notice of the pendency of such suit, and that that court decreed a conveyance of the property from Christman to Partee and wife, the title under such conveyance to relate back to the 20th day of December, 1876.

Partee and wife also filed a cross-bill against the plaintiffs, setting up the same facts set out in their answer, and praying for the cancellation of the plaintiffs' deed of trust, and for a decree against plaintiffs for the rents and profits of the property received by them between the 23d of January, 1877, and the 27th of December, 1877, from the trustee in the deed of trust, who was in possession as such under said deed, and collected the rents of

the property and paid the same to the plaintiffs for the period mentioned. The cross-bill was filed February 4th, 1878. No process has issued thereon, and the defendants, who are plaintiffs in the original bill, have not entered their appearance thereto.

The plaintiffs in the original bill now move for leave to dismiss the same. To this motion Partee and wife, who are named among the defendants in the original bill, and who are plaintiffs in the cross-bill, object, and they also move for a decree *pro confesso* on their cross-bill.

Plaintiffs claim the dismissal by them of the original bill operates to dismiss the cross-bill.

CALDWELL, J.:

The plaintiffs in the original bill have the right, as a matter of course, at any time before decree, to dismiss their bill at their own costs. (1 Barbour's Chancery Practice, 225, 228; 1 Daniell's Chancery Practice, 792.)

The cause is not at issue on the original bill—no replication to the answer having been filed—and the defendants in that bill, under rule 66, might have obtained an order, as of course, for a dismissal of the suit for this reason.

The motion of plaintiffs to dismiss their bill is granted, and the same will be dismissed at their costs.

The motion of plaintiffs in the cross-bill for a decree *pro confesso* thereon against the defendants therein named is denied.

If the defendants in the cross-bill had been served with process, or had voluntarily entered their appearance to the cross-bill, the plaintiffs therein would have been entitled to a decree *pro confesso* after the lapse of the time allowed defendants by the rules to answer.

The bill and cross-bill in equity do not necessarily constitute one suit, and, according to the established practice in equity, the service of a subpœna on the defendants in the cross-bill, although they are parties in the original bill, and in court for all the purposes of the original bill, is necessary to bring them into court on the cross-bill, unless they voluntarily enter their appearance thereto, which is the usual practice. And the general chancery rule is, that service of the subpœna in chancery to answer a cross-bill cannot be made upon the solicitor of the plaintiff in the original bill. (1 Hoffman's Chancery Practice, 355, and note 4.)

In the chancery practice of the circuit courts of the United States there are two exceptions to this rule—(1) in case of injunctions to stay proceedings at law, and (2) in cross-suits in equity, where the plaintiff at law in the first and the plaintiff in equity in the second case reside beyond the jurisdiction of the court. In these cases, to prevent a failure of justice, the court will order service of the subpœna to be made upon the attorney of the plaintiff in the suit at law in the one case, and upon his solicitor in the suit in equity in the other. (*Eckert* v. *Bauert,* 4 Wash. 370; *Ward* v. *Sebring,* Ib. 472; *Dunn* v. *Clark,* 8 Pet. 1; and for application of analogous principles to parties to cross-bills, see *Schenck* v. *Peay,* 1 Woolw. 175.)

It not unfrequently occurs that the facts constituting defendant's defences to an action or judgment at law are of a character solely cognizable in equity; and in suits in equity it often happens that the defendant can only avail himself fully and successfully of his defence to the action through the medium of a cross-bill. In suits in these courts the plaintiff is usually a citizen of another state, and hence beyond the jurisdiction of the court, and in such cases defendants who desire to enjoin proceedings at law, and defendants in equity cases who desire to defend by means of a cross-bill, would, but for this rule of practice, be practically cut off from their defences by reason of their inability to make service on the plaintiff in the action. It would be in the highest degree unjust and oppressive to permit a non-resident plaintiff to invoke the jurisdiction of the court in his favor, and obtain and retain, as the fruits of that jurisdiction, a judgment or decree to which he was not in equity entitled, by remaining beyond the jurisdiction of the court whose jurisdiction on the very subject matter, and against the very party, he had himself first invoked. The reason of the rule would seem to limit it in equity cases to cross-bills either wholly or partially defensive in their character, and to deny its application to cross-bills setting up facts not alleged in the original bill, and which new facts, though they relate, as they must, to the subject matter of the original bill, are made the basis for the affirmative relief asked. The cross-bill in this case is of this latter character, and, without deciding that this fact alone would preclude the court from directing service of the subpœna on the solicitors of the plaintiffs in the original bill,

such an order will not be made after plaintiffs have filed their motion to dismiss their bill—a motion grantable as of course.

Whether the dismissal of the original bill carries with it the cross-bill depends on the character of the latter. If the cross-bill sets up matters purely defensive to the original bill and prays for no affirmative relief, the dismissal of the latter necessarily disposes of the former. But where the cross-bill sets up, as it may, additional facts not alleged in the original bill, relating to the subject matter, and prays for affirmative relief against the plaintiffs in the original bill in the case thus made, the dismissal of the original bill does not dispose of the cross-bill, but it remains for disposition in the same manner as if it had been filed as an original bill. (*Warrell* v. *Wade,* 17 Iowa, 96; 2 Daniell's Chancery Practice, 1556.)

The cross-bill in this case is of this character, and it will remain on the docket, and the plaintiffs therein can take such action in relation thereto as they may be advised, but no steps can be taken in the case until defendants are brought into court.

Ordered accordingly.

Coach v. *Judge, 97 Mich. 563. (1893.)*

MANDAMUS. Argued October 31, 1893. Granted November 24, 1893.

Relator applied for *mandamus* to compel respondent to vacate an order setting aside a default. The facts are stated in the opinion.

HOOKER, C. J.:

Defendant, having filed an answer in which he claimed the right to affirmative relief as though upon a cross-bill, entered the default of the complainant for his failure to file an answer to the new facts set up in defendant's answer upon which the claim to affirmative relief was asked, a replication in the usual form only having been filed. This default having been set aside upon motion, defendant asks a *mandamus* requiring the circuit judge to vacate his order, it being contended that the replication is not a sufficient denial of the matter set up in the answer.

Chancery Rule No. 123 was intended to supplant the practice

of filing a formal cross-bill by a simpler method. To that end it was provided that a person might have all the benefits of a cross-bill upon an answer containing the proper averments and prayer. There is nothing in the rule that deprives the complainant of the right to answer (*Hackley* v. *Mack*, 60 Mich. 591); and we think it may also be said that there is nothing in the rule to deprive the defendant of the benefit of an answer, the same as though a cross-bill had been filed. The general replication, while technically a denial of the truth of the answer, is a formal paper, intended to complete an issue. But it cannot properly take the place of an answer. A cross-bill proper may be taken as confessed, in which case the allegations of such bill are taken as true. 2 Barb. Ch. Pr. 135. We think the same practice proper in case of an answer claiming the benefits of a cross-bill. In such case the replication puts the original case as made by bill and answer at issue, while those averments which are properly in the answer only as the basis of a cross-claim, under the rule, must be answered specifically, according to the usual practice. Complainant's default was therefore properly entered, and the order vacating the same, and striking the papers on which said order *pro confesso* was based from the files, should be vacated. A writ of *mandamus* requiring this will issue, without costs.

It is not intended hereby to foreclose the right of the complainant to apply for, and the court to grant, an order setting aside the order *pro confesso* upon a proper showing, if such relief shall be within the proper discretion of the court.

The other Justices concurred.

INTERPLEADER.

Kile v. *Goodrum*, 87 *Ill. App.* 462. *(1899.)*

MR. JUSTICE BURROUGHS delivered the opinion of the court.

We have examined the amended bill of interpleader filed by appellant in the Circuit Court of Edgar County against appellees, and find that it properly avers that appellees each claim from the estate of H. N. Guthrie, deceased, of which appellant is the administrator, the amount of a certain board bill owing by said deceased, in his lifetime, to one of them, but which one appellant

does not know; that each of the appellees are prosecuting a claim against said estate for said board bill; and that appellant fears he may be compelled to pay the same twice, for which reason he asks the court to compel them to answer his bill of interpleader, and allow the court to determine to which one he shall pay said board bill. By his bill appellant offers to bring the amount due from said estate for said board into court for the benefit of such one of the appellees as the court shall determine it belongs, and he disclaims all interest in such board bill, or that he has in any manner obligated himself to pay the same to one of the appellees in preference to the other, but that he stands indifferent between them; thus filling every requirement of a good bill of interpleader, as defined by Sec. 1332 in 3 Pomeroy's Equity Jurisprudence: (1) that the same thing, debt or duty is claimed by both or all of the parties against whom relief is demanded; (2) all the adverse title or claim is dependent on or is derived from a common source; (3) the person asking the relief does not have or claim any interest in the subject-matter; (4) he stands perfectly indifferent between those claiming the thing, debt, or duty, being in the position merely of stakeholder. See also *Newhall* v. *Kastens et al.*, 70 Ill. 156; *Ryan* v. *Lamson et al.*, 153 Ill. 520; *Platte Valley Bank* v. *Nat. Bank*, 155 Ill. 250; and *Morrill* v. *Manhattan Life Ins. Co.*, 183 Ill. 260.

It was, therefore, error for the court to sustain the demurrer to appellant's amended bill, for which reason we reverse the decree appealed from, and will remand the case with directions, to overrule the demurrer to the amended bill, and then proceed as to law and justice appertain. Reversed and remanded with directions.

PERPETUATE TESTIMONY.

Booker v. *Booker, 20 Ga. 777. (1856.)*

IN EQUITY, in Wilkes Superior Court. Decision by Judge James Thomas, September Term, 1856.

This was a bill filed by James J. Booker and others to perpetuate the testimony of one Moses Sutton, an aged man, and of infirm health, laboring under two diseases, viz: consumption and dyspepsia; as to the value of the hire and other things in reference

to a certain slave for which the complainants intended to bring suit against the executors of R. Booker; but which suit could not be brought, because 12 months had not expired since the death of R. Booker. To this bill a demurrer was filed.

1st. Because this was not a case authorizing such a bill.

2d. Because the name of the slave is not given, and the facts are too loosely stated.

The Court over-ruled the demurrer, and this decision is assigned as error.

By the Court.—McDONALD, J. delivering the opinion.

The bill in this case was filed to perpetuate the testimony of Moses Sutton. The prayer is, that the testimony may be taken *de bene esse.* The complainants allege in their bill that they are about to file a bill in Equity against the defendants, as the executors of Richardson Booker, deceased, for an account of a certain slave and other property held by the testator in his lifetime, the property of the complainants, and the profits and income arising from the hire and labour of the slave and other property; that the testator, in his lifetime, and the defendants, his executors, since his death, have failed to account for the said slave, other property and profits; that suit has not been instituted, because twelve months have not elapsed since the probate of the will; that Moses Sutton, 70 years old or upwards, of infirm health, afflicted with consumption and dyspepsia, is the sole witness to a material fact in the cause to be instituted, to-wit: that the defendant's testator, in his lifetime, acknowledged his obligation to account to the complainants for the negro and his annual value, and the value of other property; and that there is danger of said evidence being lost to complainants.

The defendants demurred to the bill on two grounds:

1st. That complainants have no right, in Equity, upon the facts stated in their bill, to proceed to take the testimony of Moses Sutton, the witness, *de bene esse,* there being no allegation that an action at Law was pending in any Court for and concerning the matters stated in said bill, which must have been the case to take the testimony *de bene esse.*

2d. That the charges and allegations of complainants in said bill, respecting the rights therein spoken of, are so general, and

inadequate, and uncertain, that no equitable relief can be granted respecting the same.

The Court below over-ruled the demurrer, and his decision is excepted to.

[1.] The defendants' Counsel insist that the bill cannot be supported to take the testimony of the witness *de bene esse,* because there is no action pending. Every bill to perpetuate testimony is a bill to take testimony *de bene esse;* that is, to take the depositions of the witness to be allowed at the hearing of the cause *pending or to be instituted, on condition* that the witness, for any cause cannot, be produced for examination; or that it is just and proper, under a full consideration of the circumstances of the case, that the evidence should be read.

[2.] So, every bill to take testimony *de bene esse,* is a bill to perpetuate testimony. It is to take the evidence of a witness who, for certain specified reasons, might not be able to attend the trial. The American Editor of Mitford's Chancery Pleading remarks, that "bills to perpetuate testimony seem divisible into two kinds, namely: bills to perpetuate testimony specifically, so called; and bills to take testimony *de bene esse.*" (P. 62, N. (1.)

[3.] It seems, from an order of the Court of Chancery in England, in the reign of Philip & Mary, that the Chancellors had placed many restraints on the perpetuation of testimony, but that the examiners of the said Courts had not, until recently, been restrained in the examination of witnesses in perpetual memory, in their offices, whereunto they had been sworn; whereupon, that order was passed which is, undoubtedly, the foundation of the bills since used to perpetuate evidence. (See 2 Am. Ed. Gresley's Eq. Ev. 129.)

By that order, the party who desired to have a witness examined, was required to frame a bill containing the cause why he would have the witness examined; and thereupon, should sue out a writ for that purpose ordained, and deliver it to the opposite party, whereby he might have notice to have the same or any other witnesses examined. (Id.) Bills which are now called bills to perpetuate testimony, and bills to take evidence *de bene esse,* have this common origin. In neither case can the evidence taken under this proceeding be used, if the witness is at the trial or is able to attend, or his testimony can be had in the usual way.

[4.] It is a departure from the ordinary mode of taking evi-

dence, and the Court of Chancery has been very strict in its requisitions upon parties who apply for the extraordinary privilege, that it may be well assured that the exigency of the case demand it.

[5.] The Court will not allow its authority to be used to fish for evidence to sustain a projected law suit; hence, where the application is to perpetuate testimony in cases where there is no suit, or one party is impeded by the act of the other, from prosecuting a pending suit, the applicant must show that "the facts to which the testimony of the witnesses proposed to be examined relates, cannot be immediately investigated in a Court of Law; or, if they can be so investigated, that the sole right of action belongs to the other party; or that the other party has interposed some impediment (as an injunction) to an immediate trial of the right in the suit at Law; so that before the investigation can take place, the evidence of a material witness is likely to be lost, by his death or departure from the country." (Story's Eq. Pleading, § 303.)

[6.] An opinion seems to prevail to some extent, that a bill to perpetuate testimony will not lie at the instance of a party who has not possession of the property which is to be the subject of litigation; and that such proceeding will only be allowed to a party who is in possession, whose right or title is liable to disturbance at the instance of another whose movements the complainant cannot control. This is a mistake. It is true, that a complainant who has a right of action for property out of his possession, cannot sustain a bill to perpetuate testimony before action brought, because he has it in his power to sue and obtain the evidence in the usual way.

But the instance stated is not the only one in which testimony may be perpetuated. In every case in which a complainant has a vested interest in a matter which is likely to become the subject of litigation, however small or contingent, and it cannot be investigated in a Court of Law or Equity, either from his inability from any legal cause to institute a suit, if he should be the plaintiff; or having sued, he is impeded by the act of the other party from prosecuting his suit, and his interest may be endangered if the evidence in support of it is lost, he may have the testimony of his witnesses perpetuated. This is the principle to be collected from the authorities, and it is in accordance with justice and common

sense. (Story's Eq. Pl. § 301, &c.; Lube's Eq. Pl. 134; Gres. Eq. Ev. 130; Smith's Ch. Pr. 484.)

[7.] The bill should state every matter which is necessary to entitle the complainants to this remedy, to-wit: their interest; the reason why suit cannot be instituted; the subject matter of the controversy, and the proof they propose to make; the interest or the duty of the defendants to contest the right or title; the ground of necessity for perpetuating the evidence.

This bill is full on these points, and we are of opinion that the prayer merely, that the testimony may be taken *de bene esse,* does not divest it of its distinctive character as a bill to perpetuate testimony given to it by its structure. The bill is amendable, in this respect, if an amendment was necessary. A bill to perpetuate testimony may be amended, in England, after the testimony has been taken under it. (Story's Eq. Pl. note to § 306.)

Under our liberal Statutes of amendment, it is impossible that a bill should be dismissed for a mere technical error. The first ground of demurrer ought to have been over-ruled.

[8.] The second ground of demurrer raises the question of the sufficiency of the allegations to entitle the complainant to the order he prays for. It is insisted that the allegations of the bill are insufficient, because the name of the slave is not set forth, for whom and for whose hire an account is to be asked, and because the other property is not described. The allegations in regard to the slave and the hire, are as full as usual in a bill calling a party to account for the value and hire of slaves, but not so in respect to the other property. The bill was amendable in that particular, and an amendment ought to have been ordered by the Court, if he had considered it defective. The testimony sought for had been taken; and if it is confined to the slave and the hire, it ought unquestionably to be received; and if it goes beyond, to other property, it will depend on the notice which the defendant had, through the direct interrogatories, of the evidence sought to be made, so as to enable him to cross-examine the witness in regard thereto, whether that part of the evidence should be read at the hearing of the cause. We will not send the case back merely for the purpose of making an amendment which would be allowed as a matter of right.

Judgment affirmed.

EXAMINE WITNESS DE BENE ESSE.

Richter v. *Jerome, 25 Fed. Rep. 679. (1885.)*

IN EQUITY. On motion to set aside order *pro confesso,* and for leave to answer.

This was a bill to take testimony *de bene esse.* The bill stated, in substance, the filing of a bill by the plaintiff, in the Western district of this state, against the defendants in this bill, the object of which was to charge with a lien certain lands lying in that district; that defendants demurred to this bill for want of equity; that the demurrer was sustained, and the bill dismissed; that the cause is now pending on appeal in the supreme court of the United States, and that it will not be reached within two years, and if it be reversed there will be a delay of six months more before evidence can be taken. The bill further set forth that the testimony of four witnesses, now living, was necessary to the maintenance of plaintiff's case, whose testimony, in the inevitable lapse of time before it can be taken in the ordinary course of business, is in danger of being lost; that one of these witnesses was over 65 years old, another over 70, and both somewhat infirm, and that they were the only witnesses to the facts which he proposes to prove by them. The bill further set forth the facts which the plaintiffs expected to prove by the testimony of each of these witnesses, and showed the same to be material; that plaintiff had been advised that he had no remedy for perpetuating the testimony of these witnesses, according to the general rules and practice of this court, and could only have relief under a bill of this nature. The prayer was for a substituted service upon the attorneys of the non-resident defendants, and that a commission might issue to take the testimony of the witnesses named in the bill, to be read, provided the case is reversed by the supreme court and remanded for hearing in the circuit. Annexed to this bill as an exhibit was a copy of the original bill, filed in the Western district, the purpose of which was to set aside the judicial sale of a large tract of land as a fraud upon the plaintiff, and others standing in like situation with him. Upon the filing of this bill an order was entered that substituted service as to the non-resident defendants be made, by serving the

subpœna upon their solicitors in the main case. This order was afterwards vacated and set aside as beyond the power of the court, and the case left to proceed against the defendant Jerome, the only resident of the state. He afterwards suffered default, and, upon the eve of signing a decree against him, came in and moved to set aside the order *pro confesso,* and for leave to answer, accompanying his motion with a copy of the proposed answer.

BROWN, J.:

This bill is an anomalous one. So far as we are informed there is no case to be found in the reports of this country of a bill solely to perpetuate testimony. To entitle the party to maintain a bill of this description the plaintiff must aver: (1) That there is a suit depending in which the testimony of the witnesses named will be material. Story, Eq. § 307. (2) That the suit is in such condition that the depositions cannot be taken in the ordinary methods prescribed by law, and that the aid of the court of equity is necessary to perpetuate the testimony. (3) The facts which the plaintiff expects to prove by the testimony of the witnesses sought to be examined, that the court may see that they are material to the controversy. (4) The necessity for taking the testimony, and the danger that it may be lost by delay.

A failure to make the proper averment in any of these particulars is good ground for a demurrer, but we do not understand that as a rule the allegations of the bill can be put in issue by an answer. In cases of bills strictly to perpetuate testimony (which will only lie when no suit has been commenced), the defendant may allege by way of plea any fact that may tend to show that there is no occasion to perpetuate the testimony; as, for instance, that there exists no such dispute or controversy as that alleged in the bill, or that plaintiff has no such interest in it as will justify his application to perpetuate the testimony. Story, Eq. Pl. 306*a*. But in bills to take testimony *de bene esse* there must be a suit depending in some court, and this of itself is evidence of a controversy between the parties. In *Ellice* v. *Roupell,* Story, Eq. Pl. 306*a,* note, Sir J. Romilly stated the rule to be in regard to bills for perpetuating testimony that defendant, by consenting to answer the plaintiff's bill, admitted his right to examine witnesses in the case, and that implies all that is demandable. "For if there is really any *bona fide* controversy between the parties, the right to perpetuate the

testimony follows as a matter of course." In a case of the kind under consideration, where a hearing cannot be had in the supreme court in less than two or three years, and the witnesses are some of them old and infirm, it is obvious that the plaintiff ought in some way or another to be able to secure their testimony against the contingency of death, absence, or mental alienation. At the same time resort ought not to be had to the extraordinary power of a court of equity, if the usual methods of procedure prescribed by statute are competent to afford relief. The case is no longer "depending" in the circuit court, and hence is removed from the operation of the act of congress permitting depositions to be taken *de bene esse*. Rev. St. § 863. From the time the appeal was perfected, the jurisdiction of the circuit court was suspended and so remains until the cause is remanded from the appellate court. Slaughter-house Cases, 10 Wall. 273. It has also been expressly held that this act has no application to cases pending in the supreme court. The Argo, 2 Wheat. 287.

Acting upon this theory that the deposition could not be taken upon notice under the statute, it seems that plaintiff applied both to the circuit and to the supreme court for leave to take his testimony by deposition under equity rule 70, but this application was refused upon the ground that he might proceed to take the depositions *in perpetuam rei memoriam* under Rev. St. § 866. *Richter v. Union Trust Co.*, 115 U. S. 55; S. C. 5 Sup. Ct. Rep. 1162. This section provides that "in any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States." The first clause of this section clearly has no application, since the supreme court has refused a *dedimus potestatem*, and the circuit court has no power to grant one by reason of the *supersedeas*. We must look, then, to the second clause, for the power of this court to order these depositions to be taken *in perpetuam*, and to "usages of chancery" for the manner in which such power shall be exercised. Before adverting to this, however, we are bound to consider whether a remedy is not afforded by section 867, which provides "that any court of the United States

may, in its discretion, admit in evidence in any cause before it any deposition taken *in perpetuam rei memoriam* which would be so admissible in the courts of the state wherein such cause is pending, according to the laws thereof."

If, then, there be any law of this state under which these depositions can be taken, and in such manner as to be admissible in the courts of the state, we think we are bound to presume that the circuit court for the Western district would exercise its discretion and receive these depositions, and hence that this bill is unnecessary. On referring, however, to the various statutes of this state upon the subject (2 How. St. §§ 6647, 7416, 7433, 7460, 7475, 7476), we find they all refer to cases pending in some court within the state, except section 7476, which authorizes "any person who expects to be a party to a suit to be thereafter commenced in a court of record" to cause the testimony of any material witness to be taken conditionally and perpetuated. But the difficulty with this section is that the plaintiff is not a person who expects to be a party to a suit to be hereafter commenced, but is already a party to a suit begun and disposed of by the court in which it was commenced, but which is liable to be remanded to that court for trial or hearing. Sections 7452 to 7458, prescribing the method of taking depositions to be used in the courts of other states, have no application, since the case, as it now stands in the supreme court, is in no condition for the taking of testimony, and never will be until it is remanded to the circuit court.

What are, then, the usages according to which depositions may be taken *in perpetuam rei memoriam* under section 866? We think an answer to this question must be found in general equity rule 90, which, in cases where the general equity rules do not apply, requires the practice of the circuit court to be regulated by the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and conveniences of the district. In England bills to perpetuate testimony are not uncommon, though much less frequent now than formerly. Upon the whole, in view of the great doubt whether there is any statute, either state or federal, or any established practice under which this testimony can be taken for use in the circuit court after this case shall have been remanded, we have come to the conclusion that the case is a proper one for a bill to take the testimony of these wit-

nesses *de bene esse,* provided the plaintiff has, by his bill, made a case in other respects for the interference of a court of equity.

The answer sets up in defense that, before the bill was dismissed, the case was pending in the circuit court for some 17 months, during all of which time this testimony might have been taken *de bene esse* under the act of congress. We do not think, however, that the plaintiff was at fault in this particular. He was not bound to presume that the circuit court would sustain the demurrer and dismiss his bill, or to act upon any such supposition. The ordinary course is not to begin taking proofs until after the case is at issue upon answer and replication, and we think plaintiff is not chargeable with laches in pursuing the usual course in that regard, particularly in view of the fact that the defendant appears to have suffered no injury by the delay. Defendant also denies, upon information and belief, that the witness Anthony has such knowledge of the facts or will give such testimony as plaintiff professes to expect, and avers that his only object is "to fish something out of him which will have a tendency to establish his case." We do not think this allegation of the bill can be traversed in this way. We have the right to infer that plaintiff would not seek to examine a witness unless he expected to obtain something material to his case, and we are not at liberty to inquire in this proceeding whether his testimony is likely to be favorable to him or not. If the original case were in a condition to permit the testimony to be taken, the plaintiff would have the right to do exactly what defendant charges him with wishing to do, viz., to probe the knowledge and conscience of these witnesses—to ascertain the exact facts which he alleges constitute a fraud upon his rights. We think that all doubts with regard to the materiality of his testimony should be construed in favor of the plaintiff.

The allegations of the answer, that the testimony of the other witnesses is not material, and that they are not the only witnesses by whom the facts can be shown, are open to the same objection. The court cannot properly pass upon these questions until the testimony is given, when the court in which the depositions are read will determine how far they are material to the plaintiff's case. Still less are we at liberty to inquire into the exact age, or mental or physical infirmities, of these witnesses. It is true the allegations with respect to these are necessary to be made in the bill, as a basis for taking the testimony, but we do not understand

them to be traversable to any greater extent than are like averments in an affidavit to take deposition *de bene esse* under the act of congress. If an issue could be made upon these facts, and testimony taken, more time might be consumed than would be necessary to take the depositions, and the whole object of the bill thus be defeated. This object is to obtain a summary examination of the witnesses, that their testimony may be perpetuated; and, as before observed, we doubt whether any of the matters of fact contained in the bill can be put in issue, except, perhaps, with regard to the existence of the controversy. Nor can we review the opinion of the court in sustaining the demurrer to the original bill, unless, at least, it appears that this bill was so clearly frivolous that it ought never to have been filed, or plaintiff could have no reason to expect that his suit could be successful.

We think plaintiff is entitled to a decree for an examination of his witnesses.

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